United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

74-1201

DOCKET NO. ~~74-2384~~

B

P/S

In The

United States Court of Appeals

For the Second Circuit

USAchem, Inc.,

Plaintiff-Appellant,

vs.

HOWARD A. GOLDSTEIN and HOWARD A. GOLDSTEIN d/b/a GOLD SEAL ASSOCIATES,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of New York

UNITED STATES COURT OF APPEALS
FILED
JUL 26 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPELLANT'S APPENDIX

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TABLE OF CONTENTS

Findings and Judgment Appealed From dated January 10, 1974 1

Judgment Entered by Clerk Thereon dated January 11, 1974 4

Findings and Conclusion on Motion for Preliminary Injunction dated July 31, 1973 5

Sales Representative's Agreement dated April 19, 1963. 9

Amendment to Sales Representative's Agreement dated December 26, 1963 11

Section 12.3 of Employee's Profit-Sharing Plan & Trust and Amendment thereto 13

District Court Judge's Charge to the Jury. 16

Excerpts from trial testimony (page numbers from original transcript appear in right-hand corner of page) . . . 23

Excerpts from testimony of James J. Dougherty given on October 3, 1963 (page numbers from original transcript appear in right-hand corner of page) . . . 164

FINDINGS AND JUDGMENT APPEALED FROM,
dated 1-10-74.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

USAchem, INC.,

Plaintiff

- vs - CIVIL 1972-646

HOWARD A. GOLDSTEIN and HOWARD A. GOLDSTEIN d/b/a GOLDSEAL ASSOCIATES,

Defendants

FINDINGS and JUDGMENT

This case was tried before the undersigned and a jury on December 11 and 12, 1973. At the trial the court determined that the only questions to be decided by the jury were: (a) Has the plaintiff sustained damages by loss of profits due to sales made by Goldstein within his contract territory? (b) If so, how much in dollar damages has the plaintiff sustained by loss of profits between August 29, 1973 and November 27, 1973? The jury found that the plaintiff had not sustained damages by loss of profits due to sales made by Goldstein within his contract territory. Based upon that finding by the jury, I find that there is no reasonable probability that the plaintiff will sustain damages during a period of eighteen months following the entry of this judgment.

I find that there is no reasonable probability that the defendant will in the future divulge to others or use for his own benefit any confidential information acquired during the course of his employment relating to sales, processes, or formulas. I find that the defendant owed to the plaintiff on August 28, 1972 $3336.00 for draws or advances against commissions, no part of which has been paid. It is, therefore

ORDERED and ADJUDGED that the plaintiff's application for an injunction against the defendant is in all respects denied.

ORDERED and ADJUDGED that the plaintiff have judgment against the defendant for $3336.00, with interest at six percent from August 28, 1972, together with costs.

Harold P. Burke

HAROLD P. BURKE
United States District Judge

January 10, 1974.

Findings and Judgment Appealed From, dated 1-10-74.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

USAchem, Inc.

-vs-

Civ- 1972-646

HOWARD A. GOLDSTEIN and
HOWARD A. GOLDSTEIN d/b/a
GOLD SEAL ASSOCIATES

SIR: Take notice of an ORDER & Judgment against the defendant for $3,336.00 with interest etc. duly granted in the above entitled action on the 10th day of January, 1974, and duly entered in the office of the Clerk of the United States District Court, Western District of New York, on the 11th day of January, 1974.

Dated: Buffalo, New York

January 11, 1974

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

To Henry W. Williams, Jr., Esq.
Attorney for Plaintiff

To Sanford Robert Shapiro, Esq.
Attorney for Defendant

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

JUDGMENT entered by Clerk thereon, dated 1-11-74.

JUDGMENT ON JURY VERDICT CIV 31 (7-68)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 1972-646

USAchem Inc.

vs.

Howard A. Goldstein and
Howard A. Goldstein d/b/a
Gold Seal Associates

JUDGMENT

This action came on for trial before the Court and a jury, Honorable HAROLD P. BURKE, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged **that the plaintiff, USAchem, Inc., have judgment against the defendant, Howard A. Goldstein and Howard A. Goldstein d/b/a Gold Seal Associates, for Three Thousand Three Hundred Thirty-six Dollars and no cents, with interest at six percent (6%) from August 28, 1972, together with costs of this action.**

Dated at Buffalo, New York, this 11th day of January, 1974.

JOHN K. ADAMS

Clerk of Court

FINDINGS AND CONCLUSION on Motion for Preliminary Injunction, dated 7-31-73.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

USAchem, INC.,

Plaintiff

- vs - **CIVIL 1972-646**

HOWARD A. GOLDSTEIN & HOWARD A. GOLDSTEIN d/b/a GOLD SEAL ASSOCIATES,

Defendant

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Rochester, N.Y. 14614
Attorneys for plaintiff
Tobolowsky, Schlinger & Blalock
1900 Southland Centre
Dallas, Tex. (of counsel)

Sanford Robert Shapiro
707 Wilder Building
Rochester, N.Y. 14614
Attorney for defendant

FINDINGS OF FACT

1. Plaintiff is a Texas corporation. The defendant Howard A. Goldstein d/b/a Gold Seal Associates is a resident of Rochester, New York.

2. The plaintiff is the surviving entity of a merger between it and National Chemsearch of New York, and is the successor in interest to all assets of National

Chemsearch of New York. In connection with sales and distribution of its products, plaintiff employs commissioned salesmen to solicit orders and to sell its products.

3. On or about April 19, 1963, plaintiff's predecessor employed Goldstein as a sales representative and on that date Goldstein executed a sales representative's agreement assigning a territory in New York to Goldstein. On October 15, 1963 plaintiff and Goldstein executed an amendment to the agreement whereby an additional county was added to Goldstein's territory. The agreement contained a provision that for a period of 18 months immediately following the expiration or termination of Goldstein's employment he would not sell or offer for sale products of competitors within his assigned territory.

4. At some time around August 28, 1972, Goldstein terminated his employment and organized his own company, Gold Seal Associates, to solicit and sell products similar to the products he sold for the plaintiff within the territory assigned to Goldstein in the contract and, since that time, has been selling such products within said territory.

5. By this action the plaintiff seeks a preliminary injunction, and thereafter an injunction for a period of 18 months from the date of final action or order of this court, and a permanent injunction. In addition the plaintiff seeks an accounting by Goldstein to the plaintiff for damages asserted in the complaint. In addition the plaintiff seeks punitive damages.

6. The proceeding now before this court for determination is plaintiff's motion for a preliminary injunction pending the trial. The motion came on for a hearing before this court on March 12, 1973. The defendant had moved to dismiss the complaint and that motion was also heard on March 12, 1973.

7. There is no showing that the plaintiff will suffer irreparable damage if this court does not grant a preliminary injunction. An ultimate judgment for damages sustained by the plaintiff as a result of defendant's alleged breach of contract and an injunction, granted at the conclusion of the trial, would be adequate protection for the plaintiff, without the issuance of a preliminary injunction.

Findings and Conclusion on Motion for Preliminary Injunction,
dated 7-31-73.

CONCLUSION OF LAW

1. The plaintiff is not entitled to a preliminary injunction.

IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction is denied. The defendant's motion to dismiss the complaint is denied.

Harold P. Burke

HAROLD P. BURKE
United States District Judge

July 31, 1973.

SALES REPRESENTATIVE'S AGREEMENT,
dated 4-19-63.

Ex. 442

SALES REPRESENTATIVE'S AGREEMENT

THIS AGREEMENT, made and entered into this 19th day of April

19 63, between NATIONAL CHEMSEARCH CORPORATION OF NEW YORK, a Texas corporation

(hereinafter referred to as "Company"), and Howard Alan Goldstein

(hereinafter referred to as "Representative"):

WITNESSETH:

In consideration of One Dollar ($1.00) and other good and valuable considerations in hand paid by Company to Representative, the employment of Representative upon the terms and provisions herein set forth, the mutual covenants and agreements herein contained and each act done pursuant hereto by either of the parties, it is covenanted and agreed as follows:

1. Company hereby employs Representative, subject to the conditions hereinafter set forth, as a sales representative on a commission basis in the territory specified in Paragraph 4 or such other territory(ies) as Company in its discretion may from time to time assign to Representative (such territory being hereafter referred to as the "assigned territory"). The Commissions to be paid to Representative shall be in accordance with the Commission Schedule and Commission Rules and Regulations of the Company as amended by the Company from time to time. Company may periodically advance to Representative against Commissions earned and commissions to be earned amounts established by the Company from time to time. The Company shall have the right to do business in the assigned territory under various trade names. The Company reserves the right to employ other Representatives to solicit and sell in the assigned territory.

2. Representative accepts said employment, and it is agreed that the duties of the Representative shall be such as are from time to time assigned to him by the president, any vice president, secretary, treasurer, sales manager, sales trainer, or office manager of Company.

3. It is expressly recognized and acknowledged by Representative that Company and its affiliated and associated Companies are engaged in the manufacture, distribution and sale of disinfectants, soaps, detergents, cleaners, insecticides, chemical specialties, paints, water treatments, maintenance chemicals, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment and related products, in substantially all of the states in the continental limits of the United States, including the assigned territory. It is expressly recognized and acknowledged by Representative that (i) Company has developed and established a valuable and extensive trade of its products; (ii) its business connections and customers have been established and maintained at great expense and are of great value to it; (iii) that Representative desires employment by Company and by virtue of such employment Representative will become familiar and possessed of the manner, methods and secrets and confidential information pertaining to such business, including without limitation; sales volume and strategy, number and location of sales representatives, and names and lists of Company's customers and clientele; (iv) by virtue of such employment Representative will become personally acquainted with the customers and trade of Company in the assigned territory; and (v) Company will suffer great loss and damage if, during Representative's employment by Company or at any time subsequent to the termination of such employment, Representative should (a) for himself or on behalf of any other person(s), firm(s), partnership(s) or corporation(s) sell, offer for sale or solicit the sale of disinfectants, soaps, detergents, chemical specialties, paints, water treatments, maintenance chemicals, cleaners, insecticides, adhesives, glues, paper products for industry and institutions, degreasing, sanitary supply and floor maintenance materials and equipment in the assigned territory or (b) engage in or enter the employment of or act as a sales agent or broker for the products of or as an advisor or consultant to any person(s), firm(s), partnership(s), or corporation(s) engaged in or about to be engaged in the manufacture, distribution or sale of disinfectants, soaps, detergents, chemical specialties, paints, water treatments, maintenance chemicals, cleansers, insecticides, adhesives, glues, paper products for industry and institutions, degreasing, sanitary supply and floor maintenance materials and equipment business in the assigned territory. Representative further recognizes and acknowledges that (i) it will be difficult, if not impossible to compute the amount of such loss or damages, (ii) by reason of Representative's financial circumstances Representative cannot respond in damages in an action at law to compensate Company for such loss or damages, and (iii) Company, accordingly, is without adequate legal remedy in the event Representative violates any of the covenants contained in Paragraphs 4 and 5. Representative acknowledges that the covenants and conditions of this Agreement are reasonable and necessary for the protection of the Company's business.

4. Representative expressly covenants and agrees that during the term of his employment by Company and for a period of eighteen (18) months immediately following the expiration or termination of such employment for any reason including, without limitation, termination by mutual agreement, (i) he will not at any time for himself or on behalf of any other person(s), firm(s), partnership(s), or corporation(s), sell, offer for sale, or solicit the sale of disinfectants, soaps, detergents, cleaners, chemical specialties, paints, water treatments, maintenance chemicals, insecticides, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment within the assigned territory, viz:

A. The following counties in the State of New York: Steuben, Yates and Ontario plus the following municipalities in Monroe County, New York: Honeoye Falls, Rush, Mendon, Henrietta, Pittsford, Ridgeland and Rochester.

Exhibit "A"

B. Any territory(ies) which is hereafter assigned to Representative by written contractual change or de ignation;

C. Any territory(ies) not presently assigned to Representative, but which was assigned as part of his territory under any prior contract of employment with Company or one or more of its affiliated and associated companies;

D. Any territory(ies) to which Representative is transferred by mutual consent of the parties whether or not such agreement is evidenced in writing;
E. Any territory(ies) which Company in the exercise of its discretion may assign to Representative, whether or not such assignment is evidenced in writing;
F. Any territory(ies) in which Representative sells, offers for sale, or solicits the sale of disinfectants, soaps, detergents, cleaners, chemical specialties, paints, water treatments, maintenance chemicals, insecticides, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment for Company or one or more of its affiliated and associated companies;

and (ii) he will not in any way, directly or indirectly, for himself or on behalf of or in conjunction with any other person(s), partnership(s), firm(s) or corporation(s), solicit, divert, take away or attempt to take away any of the Company's customers or the business or patronage of any such customers located within said assigned territory. Representative further covenants and agrees that he will not within said period of time, directly or indirectly, engage in or enter the employment of or act as a sales agent or broker for the products of or as an advisor or consultant to any person(s), firm(s), partnership(s) or corporation(s) engaged in or about to become engaged in the manufacture, distribution or sale of disinfectants, soaps, detergents, cleaners, insecticides, chemical specialties, paints, water treatments, maintenance chemicals, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment within the assigned territory. In the event of violation by Representative of any one or more of the covenants contained in this paragraph, it is agreed that the term of each such covenant so violated shall be automatically extended for a period of eighteen (18) months from the date on which Representative permanently ceases such violation or for a period of eighteen (18) months from the date of the entry by a court of competent jurisdiction of a final order or judgment enforcing such covenant(s), whichever period is later.

5. Each restrictive covenant hereinabove set forth in Paragraph 4 is separate and distinct of every other restrictive covenant set forth in said paragraph and in the event of the invalidity of any such covenant the remaining obligations shall be deemed independent and divisible. The parties agree that the inclusion of all the territories hereinabove set forth in Paragraph 4 is reasonable and necessary for the protection of Company. If, however, the inclusion of all said territories shall be deemed too extensive and therefore unreasonable, such lettered paragraph under Paragraph 4 above shall be deemed as separate and divisible, and to the extent necessary to make the territory reasonable, shall be eliminated in the reverse order from which each is stated.

6. Representative shall not at any time, either during his employment or after the termination of such employment, divulge to others or use for his own benefit any confidential information obtained during the course of his employment by Company relating to sales, formulae, processes, methods, machines, manufactures, compositions, ideas, improvements or invention belonging to or relating to the affairs of Company, its subsidiaries, affiliates, successors or associated companies.

7. It is agreed that if Representative's employment by Company is terminated for any reason, no commissions shall be due or payable to Representative on orders secured by him but not shipped as of the effective date of such termination.

8. Representative agrees during the term of said employment that he will devote his entire time and attention exclusively to the business and interests of the Company and that he will perform to the entire satisfaction of the Company, such duties as may be assigned to him and that he will do his utmost to further enhance and develop the business interests and welfare of the Company.

9. This agreement shall be effective upon execution and may be terminated at any time by either party without notice.

10. In connection with Representative's performance of his duties and obligations in the assigned territory, Company is furnishing Representative with sales catalogs, brochures, samples, sample cases, machinery, equipment and other sales aids and will from time to time during Representative's employment furnish additional sales aids. It is understood and agreed that all such property so furnished Representative is and will remain the property of Company. Representative recognizes and agrees that said sales aids and other property furnished him have been carefully developed by Company over long periods of time at great cost and expense; that because of Company's great expenditures for research and development and for exclusive merchandising tools and methods, great loss and damage will result to Company if said sales aids or other preporty should fall into the hands of unauthorized persons; that failure to return same in the event of the termination of his employment will cause great loss and damage to the Company; that such loss and damage is difficult, if not impossible to compute. Accordingly, in the event Representative's employment is terminated for any reason, or no reason, Representative agrees to return all such property to Company at its main office, freight collect, and that in the event he fails or refuses for any reason, or no reason, to so return said sales aids and other property to Company, as herein agreed to he will pay to Company at its principal office the sum of $500.00 as liquidated damages and not as a penalty for breach of terms and provisions of this Paragraph.

11. This contract shall be construed under and governed by the laws of the STATE OF TEXAS.

12. The provisions of this contract shall be fully applicable whether Representative is employed by Company, or by any of its subsidiaries, affiliates, successors or associated companies, it being understood and agreed that this Agreement may be assigned without notice at any time and from time to time by Company to or by any of its subsidiaries, affiliates, successors or associated companies. In the event of such an assignment, any such Company to which the Agreement is assigned shall automatically be substituted for the Company executing this Agreement for all intents and purposes and to the same extent as if such assignee were the Company executing this Agreement.

IN WITNESS WHEREOF, Representative has herewith affixed his hand and seal and Company has caused this Agreement to be executed by a duly authorized officer, all the day and year first above mentioned.

NATIONAL CHEMSEARCH CORPORATION OF NEW YORK

By _____
COMPANY

_____ (Seal)
REPRESENTATIVE

AMENDMENT TO SALES REPRESENTATIVE'S AGREEMENT, dated 12-26-63.



Leader in Chemical Research — Since 1919

DALLAS • ST. LOUIS • NEW YORK • LOS ANGELES ◻ 10 ROCKEFELLER PLAZA • NEW YORK 20, N. Y.

December 26, 1963

Mr. Howard Goldstein
80 Norton Village Lane
Rochester 9, N. Y.

Dear Howard:

RE: Amendment to Sales Representative's Agreement between us dated April 19, 1963

Your Sales Representative's Agreement is hereby amended by the addition of the following territory as your "Assigned Territory":

The following county in the State of New York: Genesee.

This Amendment shall be effective for all purposes as of October 15, 1963.

Please signify your approval of this Amendment by signing the original and the first and second copies of this letter in the space provided below for this purpose and thereafter attach one of the carbon copies so signed by you to your original Sales Representative's Agreement

EXHIBIT "B"

and return the original and one carbon copy so signed by you marked for my personal attention.

Sincerely yours,

NATIONAL CHEMSEARCH
CORPORATION OF NEW YORK, Inc.

By _____

ACCEPTED AND AGREED TO:

This 27 day of December, 1963.

_____
Howard Goldstein

the credit of his Individual Account, such Participant in addition, shall be entitled to benefit from a percentage of the then remaining balance of his Individual Account which is vested in accordance with the following schedule:

(1) Such Participant shall be entitled to one credit for each Year as a Participant in the Plan, and one credit for each full two years of Continuous Service with Employer prior to becoming a Participant.

(2) Continuous Service of less than two full years prior to becoming a Participant in the Plan shall not entitle a Participant to a credit, nor shall continuous employment of more than two years, or more than a period divisible by two, prior to becoming a Participant in the Plan entitle a Participant to any credit or portion of a credit in addition to the credits for units of two years Continuous Service actually completed. For example, a Participant with five and one-half years Continuous Service prior to becoming a Participant in the Plan shall only be entitled to two credits for the Continuous Service prior to becoming a Participant in the Plan.

(3) The schedule showing the percentages which vest in the Participant is as follows:

Credits	Percentage Vesting in Employee
1-4	0
5	25%
6	30%
7	35%
8	40%
9	45%
10	50%
11	55%
12	60%
13	65%
14	70%
15	75%
16	80%
17	85%
18	90%
19	95%
20	100%

A Participant's vested interest is subject to being divested by the forfeiture provisions of Paragraph 12.3

Section 12.3 If, in the judgment of the Committee, the severance of employment of any Participant is due to any dishonesty, or to a criminal act, committed in the course of his employment, then all amounts allocated to such Participant's Individual Account shall be forfeited. In the event that a Participant or Former Participant directly or indirectly competes with Employer, or enters into the employment of any corporation, partnership or proprietorship or other business organization doing business in direct or indirect competition with Employer, or has any direct or indirect competition with Employer,

BEST COPY AVAILABLE

or has any direct or indirect ownership in such a corporation, partnership, proprietorship or other business organization, after severance of employment, such Participant shall forfeit all amounts remaining in such Participant's Individual Account. In determining whether a Participant or Former Participant is engaging in competition with Employer within the meaning of the preceding sentence, the good faith judgment of the Committee shall be final and conclusive of the matter.

Section 12.4 The portion of his Individual Account to which a Participant shall be entitled under the above schedule shall be paid to him in accordance with Article XIV hereof. Each such payment shall be charged to his Individual Account and payment to him shall continue until his death or until his Individual Account is paid to him in full, whichever of said events first occur.

Section 12.5 A Participant to whom this Article XII is applicable shall forfeit that portion of the amount of his Individual Account to which he is not entitled under Section 12.2 and the amount thus forfeited shall remain in the Trust Fund and shall be allocated among the Individual Accounts as of the next Anniversary Date as provided in Section 6.1. The amount forfeited by a Participant shall be charged to his Individual Account as of the date his employment is terminated.

Section 12.6 It is Employer's intention to make annual contributions to the Plan. However, if Employer shall fail to make any contribution for three consecutive years the Individual Accounts of all Participants shall thereupon become fully vested. Failure to make a contribution in any one year, or for two consecutive years, shall not be deemed a discontinuation of contributions and such failure shall not effect the vesting provisions as provided in Section 12.2.

ARTICLE XIII

Notices

Section 13.1 As soon as practicable after a Participant ceases to be in the employ of Employer for any of the reasons set forth in Articles IV to XIII inclusive, the Committee shall give written notice to the Trustee, which notice shall include such of the following information and directions as are necessary

Section 12.3 of Employee's Profit-Sharing Plan & Trust
and Amendment thereto.

particulars:

I.

Article I, Section 1.11, subsections A.(3) and A.(4) shall be deleted and the following provisions shall be substituted as subsections (3) and (4) of subsection A. of Section 1.11 of Article I of such Plan:

"Section 1.11

A. (3) contractual bonuses, bonuses by formula and discretionary bonuses provided that in operation of the Plan the inclusion of such bonuses does not discriminate in favor of officers, shareholders, persons whose principal duties consist of supervising work of other employees or highly compensated employees.

(4) gross sales commissions earned."

II.

The first sentence of Section 4.1 of Article IV shall be deleted and the following sentence inserted as the first sentence of Section 4.1 of Article IV of such Plan:

"Each Participant shall have the right to make voluntary contributions to the Trust Fund while he is a Participant but his contributions for any Year shall not exceed 6% of his Annual Compensation for that Year."

III.

The first sentence of Section 12.3 of Article XII shall be deleted and the following sentence inserted as the first sentence of Section 12.3 of Article XII of such Plan:

"If, in the judgment of the Committee based upon certification to the Committee by the Board of Directors of the Employer, the termination of employment of any Participant is due to any dishonesty, or any criminal act, committed in the course of his employment, then the amounts allocated to such Participant's Individual Account shall be forfeited."

IV.

Subsection (1) of Section 14.1 of Article XIV shall be deleted and the following Subsection (1) inserted as Subsection (1) of Section 14.1 of Article XIV of such Plan:

"(1) A lump sum, payable in cash, in kind based on fair market value, of both;".

AFTERNOON SESSION

Thursday, December 13, 1973

1:30 o'clock P.M.

(Jury present)

(Mr. Shapiro made a Closing Statement on behalf of the Defendant.)

(Mr. Williams made a Closing Statement on behalf of the Plaintiff.)

CHARGE OF THE COURT

THE COURT: Members of the Jury:

The plaintiff is engaged in the business of manufacturing and selling chemicals and other related items for the maintenance of buildings and building services. It conducts its business of selling its products solely by the use of salesmen. The plaintiff hired Goldstein as a salesman on April 19, 1963. At or about the time of his hiring, the plaintiff and Goldstein entered into a written Sales Representative's Agreement. By the terms of that agreement, Goldstein was assigned a certain non-exclusive territory defined as the Counties of Steuben, Yates and Ontario, and in addition thereto the municipalities of Honeoye Falls, Rush, Mendon, Henrietta, Pittsford, Ridgeland

and Rochester.

The Sales Agreement was amended October 15, 1963, by adding Genesee County. By the terms of the written contract, Goldstein agreed not to compete with the plaintiff on his own behalf or on behalf of anyone else in his territory during his employment by selling competing products, and in addition for eighteen months following termination of the agreement or eighteen months after Goldstein ceased violating the agreement. By the terms of the contract, Goldstein also agreed not to divulge to others or to use for his own benefit any confidential information acquired during the course of his employment relating to sales, processes or formulas.

Goldstein continued in the employment of the plaintiff as a salesman up to about August 28, 1972, when he voluntarily terminated his employment. He formed his own company called Gold Seal Associates by filing in the Monroe County Clerk's Office on August 1, 1972, a certificate showing that he intended to do business under the assumed name of Gold Seal Associates. He is the only distributor and salesman for Gold Seal Associates. Gold Seal Associates sells commercial chemical specialty products which are similar in function

and are competitive with plaintiff's products. Gold Seal Associates sells its products in the same territory covered by the written agreement by the plaintiff and Goldstein and to former customers that Goldstein sold to and serviced when he was employed by the plaintiff.

Goldstein first contacted suppliers of commercial chemical specialty products on behalf of Gold Seal Associates in July, 1972, but his first sale of commercial chemical specialty products for Gold Seal Associates was on August 29, 1972. From that time to November 27, 1973, Goldstein made 282 sales of Gold Seal Associates products to customers that he formerly serviced and sold for the plaintiff.

From August 29, 1972, to November 27, 1973, Goldstein's sales of Gold Seal products to customers he formerly sold and serviced for the plaintiff amounted to $53,187.87.

Now these are only my figures that I gleaned from my rough notes during the course of the trial. You are not at all bound by them. If your version is different from mine, you rely on your own recollection of the evidence and reach your conclusion on all the evidence bearing on these questions that I am about

to submit to you.

A person may voluntarily, and in the absence of fraud, enter into any kind of an employment agreement he chooses, provided its provisions are not in violation of law or in violation of public policy. The provisions of this particular contract relating to post-employment competition are not in violation of law and are not in violation of public policy. The limitations against post-employment competition were reasonable, both as to time and territory limitation. The contract provisions were valid and are enforceable. I so instruct you as a matter of law. As established by the defendant's own testimony, he has violated those provisions and continues to do so.

So we get down to the question of damages that the plaintiff may recover, based upon those violations. Under the contract Goldstein was entitled to receive advances or draws against commissions to be earned. This was in the nature of loans to Goldstein. The evidence shows that in August, 1972, when he terminated his employment, he owed about $3,800 by reason of his advance draws, and he still owes the plaintiff about $3,300. You need have no concern about deciding that question. I will determine that as a question of

law.

Under the contract, either party had the right to terminate the employment at any time. Goldstein did terminate it in August, 1972, as he had a right to do. For that reason, the plaintiff may not recover as an item of damage the cost to the plaintiff of training a salesman for his territory. That expense was not occasioned by Goldstein's post-employment competition with the plaintiff. It was occasioned by Goldstein's lawful termination of his employment, and is not recoverable. If the plaintiff has sustained damages by loss of profits between August, 1972, and November, 1973, because of Goldstein's competition in selling Gold Seal products in the contract territory to his old customers that he sold while employed by the plaintiff, then loss of those profits is a proper item of damages which is recoverable against Goldstein.

There has been evidence on behalf of the plaintiff as to the dollar value of sales made by Goldstein since August, 1972, to November 27, 1973, to his old customers in his contract territory, and as to the percentage of profits that the plaintiff has lost, based upon the dollar value of sales made by Goldstein up to November 27, 1973 to his old customers. I leave it

to you to determine how much in dollar value the plaintiff has been damaged by loss of profits from August, 1972, up to November 27, 1973.

I hold as a matter of law that the plaintiff may not recover punitive damages by way of example for his acts in violation of the contract provision against post-employment competition.

So, to get down to the only questionsthat you have to decide in this case as questions of fact, they are reflected in these two specific questions which I will submit to you in writing to be answered in writing and signed by the Foreman of the jury in behalf of all the jurors.

The answers to these two questions will constitute your entire verdict and will dispose of the only questions I am leaving to be decided by the jury as questions of fact. All other questions in the case, I will decide as questions of law.

No explanation of your written answers to the questions submitted for your determination is required, and no explanation is appropriate.

To be effective as a verdict, your answers to these questions must be unanimous.

The plaintiff has the burden of establishing

by a fair preponderance of the evidence (1) that it has sustained damages by loss of profits by reason of sales made by the defendant within his former contract assigned territory; and (2) the amount of such loss of profits by reason of sales made by the defendant within his former contract assigned territory. By a "fair preponderance of the evidence" means simply that the believable or credible evidence in support of the plaintiff's claim of loss of profits and the amount thereof, must outweigh in your judgment the evidence against those claims.

The questions are as follows:

(1) Has the plaintiff sustained damages by loss of profits by reason of sales made by the defendant within his former contract assigned territory?

(2) If your answer to Question 1 is yes, how much in dollar damages has the plaintiff sustained by loss of profits by reason of sales made by the defendant within his former contract assigned territory, between the dates August 29, 1972, and November 27, 1973?

I'm handing those questions to the Clerk to hand to the jury and to be taken into the Jury Room, and as I said, signed by the Foreman in behalf of all the jurors.

Any requests or exceptions?

THE COURT: When you said "maintenance supplies," you said it all.

A That's right. It is just a broad range. It is from simple cleaners to very sophisticated cleaners or maintenance, sophisticated lubricants, lubricants to be used only in a food plant, for instance, which is a very different type of lubricant than you would use in a machine shop. Maybe this is a good example: We would carry a lot of lubricants; one is a basic-type lubricant which might be used on just open gears in a plant, whereas selling to a food or a cannery, you would have to use a type of lubricant on the food processing equipment that could not be dangerous.

THE COURT: We are getting into a lot of unnecessary technicalities here, I think.

MR. WILLIAMS: Yes, Your Honor, except, I believe, some specific examples such as this may be helpful to the jury in understanding the business of the plaintiff, and then perhaps giving them a little personification of the business; although, I believe your example is sufficient. Thank you, Mr. Piassick.

Q Tell us about where all these products are made and by whom they are made and how you develop them.

A All right. In the U. S., there are currently three plants that are owned either by the parent company or subsidiary

* * * * *

I don't have any figures.

Q Give us round numbers.

A I would say there are four hundred persons employed at the Irving plant in production, warenousing and shipping. At the other two plants, and these are much smaller plants, there might be twenty-five persons employed in each one of them in what we would call in the production area. There would also be other employees there in the administrative and clerical areas.

Q How many people,exclusive of your salesmen, do you employ in all?

A I think there are approximately about two thousand.

Q Two thousand?

A Yes -- excuse me -- one thousand. I was including the salesmen.

Q A thousand non-salesmen and a thousand salesmen, correct?

A That is about right.

Q How old is National Chemsearch or USAchem?

A National Chemsearch Corporation dates back to 1919. USAchem was formed in 1972, but its predecessor corporation has been doing business for years.

Q When you came to the company, what were its sales?

A Approximately nine million dollars. Now this was not confined to the United States. It is almost in every country in the non-Communist world.

* * * * *

Q You'd better tell us what a "commissioned sales representative is."

A Well, this is where, based on the man's sales, his earnings are determined, let's say, on the percentage of his sales or on a commission structure, which is set up based on the product.

Q Take an example. Take the kind of lubricant that is used in the food processing plant, and supposing a salesman sells that lubricant, how is he rewarded for that?

A All right. Product X might sell for $100 at a certain size container. In this case, he would receive approximately $29 in commission. On some products the commission rate would be higher. He might sell --

THE COURT: Are they set forth some place?

A They are set forth in commission lists and price lists. The commission percentages range anywhere from thirty-five per cent, let's say, down to twenty-two per cent, but the average commission overall for our company is somewhere around twenty-nine per cent of the selling price.

Q Is there a method by which these commission rates are determined?

A Well, based on our costs of producing the product and selling price.

Q Do you take into account the difficulty or ease of selling it?

A No, not really.

Q You have told us that you have a thousand salesmen in the field?

A Approximately.

Q Do you have Exhibit 1 for identification before you?

A Yes.

Q What is the date of that Exhibit?

A This is the 19th of April, 1963.

Q Now before you employ a salesman, you require him to sign that agreement?

A Yes.

Q And is that the unvarying practice of the company?

A It is true not only of the salesmen but of its sales management personnel.

THE COURT: We are only interested in the salesmen at the moment.

THE WITNESS: Okay.

Q Tell me why you have the salesmen sign that contract?

MR. SHAPIRO: I'm going to object to that.

THE COURT: Objection is overruled.

A Well, we feel in our business that --

MR. SHAPIRO: I'm going to object to his statement "we feel." I don't know who "we" are.

THE COURT: Objection is overruled.

A (Continuing): The company feels that our selling techniques or philosophy are such that we need the protection afforded in that document. We don't sell through mass advertising, such as Johnson's Wax would sell to the home consumer. We are not an everyday trade name that rolls off the tip of somebody's tongue. Our sole contact, or let's say ninety-nine per cent of the contacts --

THE COURT: Don't belabor this point. Let's get down to the lawsuit.

MR. WILLIAMS: Thank you, Your Honor. It is an important point, though, in view of the nature of the business of the company.

THE COURT: Well, you can overemphasize it. Let's put it that way.

Q Then I will ask the question in a somewhat different manner, and I will ask you, Mr. Piassick, if I may, do you sell any of your products in stores?

A No.

Q Do you sell them exclusively through your salesmen?

A Yes.

Q Do you have a philosophy regarding the sales that your salesmen are instructed --

MR. SHAPIRO: I'm going to object.

THE COURT: I will sustain the objec-

tion.

MR. WILLIAMS: I will reword the question.

Q Tell me about the training of salesmen, the recruiting and training of salesmen?

MR. SHAPIRO: I object to the general discussion of training of salesmen.

THE COURT: I will sustain the objection as to that. What they did with somebody else doesn't make any difference. What they did with this man is important.

Q Did you train Mr. Goldstein?

A I personally, of course, did not train him, but the company's sales management personnel did.

MR. SHAPIRO: I object to what he is testifying to that somebody else did.

THE COURT: Are you going to have testimony about that?

MR. WILLIAMS: We will have testimony from Mr. Goldstein.

THE COURT: What?

MR. WILLIAMS: We will have testimony from Mr. Goldstein and from others about his training.

THE COURT: I am not interested in

"others" -- I mean from the company's standpoint, have you got somebody that knows particularly about the training of Goldstein?

MR. WILLIAMS: Yes, we do.

THE COURT: Then you don't need this.

MR. WILLIAMS: I was unaware that there was an issue in this case about the fact that he received training.

THE COURT: If there isn't, I don't know what you are putting in proof about it for.

MR. WILLIAMS: Just to lay a foundation for the case, Your Honor, to show what the company does with regard to its salesmen.

THE COURT: I don't know what that means "lay a foundation for it." I always take it the proof has something to do with the case.

MR. WILLIAMS: Well, this proof does.

THE COURT: The easiest way is not to talk about it. Go ahead.

Q In any event, was Mr. Goldstein put into your training program?

A Yes.

Q Tell me what the training program is?

MR. SHAPIRO: I'm going to object to that. He is testifying to what somebody else

* * * * *

A It was to add one additional county to Mr. Goldstein's territory, and that being Genesee County.

Q During the course of Mr. Goldstein's employment, did the company give him products or give his customers products?

A Well, they did both. They furnished Mr. Goldstein with samples, and, of course, they shipped products to the customers when they were sold.

Q Did they give him supports to enable him to sell?

A Yes.

Q Did they explain the nature of the products to him?

MR. SHAPIRO: I object. He doesn't know what they explained --

THE COURT: Objection is overruled.

A Yes. This is done in several ways.

MR. SHAPIRO: I'm going to object. It is hearsay as to this witness.

THE COURT: Objection is overruled.

Q You may continue.

A The products are explained in various ways in printed form through basically two major documents of the company; one is a presentation book with the products, describing how to use the products shown there. There are gears of selling pertaining to the products.

Q Tell me what "gears of selling" is?

THE COURT: Are these booklets fur-

nished to the salesmen?

A Yes.

Q And you are familiar with those booklets?

A Yes, sir, I am.

MR. SHAPIRO: Your Honor, his testimony is just not the best evidence of what gears of selling is. If he is going to start testifying as to what a book says, we ought to have the book.

THE COURT: Are you going to have those booklets?

MR. WILLIAMS: No. I'm just going to ask him what gears of selling is. It is not necessary to burden the Court and jury with long sales promotional manuals that don't bear on the issues of the case.

MR. SHAPIRO: I am going to object.

THE COURT: I will sustain the objection. If you think it is important, it seems to me it is important to see what it says and not have somebody relate what it says. Manifestly, he can't remember the whole booklet.

MR. WILLIAMS: Your Honor, thank you, but I believe he has referred to a term "gears of selling," which may not be a familiar document

* * * * *

AFTERNOON SESSION

2:00 o'clock P.M.

- - -

(Jury present.)

A L L E N P I A S S I C K,

resumed the stand, having previously been sworn, testified further as follows:

DIRECT EXAMINATION CONTINUED

BY MR. WILLIAMS:

Q Mr. Piassick, before the recess I asked you if Mr. Goldstein at the beginning of his employment was furnished with the names of customers of USAchem?

A Yes. He was given what we term route sheets, which not only have the names and addresses of accounts we sold but what we have sold them when we sold them and the price we sold it at.

Q Does it also contain the names of the contacts of the particular customer?

A Yes, it does, the particular individual whom the salesman might have spoken to and sold at the date of the particular sale.

Q Thereafter, were additional names added to the route sheet by Mr. Goldstein?

A Yes.

Q Were those considered Mr. Goldstein's customers or the

* * * * *

MR. SHAPIRO: I'm going to object to that.

THE COURT: I will sustain the objection. That is a question of fact for the jury.

Q You have testified, Mr. Piassick, that after a man is hired he receives training. What period of training is he given before he is fully qualified as a salesman with the company?

A This, again, is general company policy as our managers and trainers are trained to work with the new salesmen. The salesman, after he is hired, he is given various materials as part of his training. He is given a presentation binder, a very large book with every product in it, telling him what the products do. He is given gears of selling matter. He is given a basic products book so that rather than at first looking at 280 products, he maybe has twenty products that are the more widely sold products, and it tells him exactly how to demonstrate these products in written words, how to demonstrate these products in front of a customer.

Q Tell us how long the process of training takes?

THE COURT: He hasn't talked about any process at all. He has talked about giving him books.

Q How long does the process of training take, Mr. Piassick?

MR. SHAPIRO: I'm going to object.

THE COURT: He hasn't told about the

training yet. What you have asked is what the salesmen were given. Then you asked him about training. He hasn't spoken about any training yet.

THE WITNESS: The training then begins and the man has a sample case, and he has equipment to demonstrate products with. He now has the tools to go out. The first week he goes out with one of our older salesman, in that older salesman's territory. He is only, in effect, a watcher, to observe that salesman. The older salesman is not necessarily geared to train the man to sell our products or our customers, but he rides with him that whole week to see if he can get a better understanding of the business before he actually goes into his own territory. We pay for the man to go there.

MR. SHAPIRO: Your Honor, I'm going to object. He is an accountant, and he is testifying now how the average training methods --

THE COURT: He is a treasurer. He ought to know something about how the company is running. The objection is overruled.

THE WITNESS: The next step is, the following week a sales manager is sent into the

man's territory that has been assigned to him. Normally, he is there for four days during that week. He is working with the man all day long and very often at night back at the manager's hotel room, if it happens to be at a place where the manager does not live. He will go into demonstration of products and he will go into sales techniques. At the beginning of the week, the manager will be doing a lot of selling --

MR. SHAPIRO: I object. Again, Your Honor, he has talked about things which he has no personal knowledge.

THE COURT: Objection overruled.

THE WITNESS: I've lost my train of thought there. Between sales, the manager is supposed to sit with the man and tell him the various points of the sales techniques that were employed either by himself or possibly missed by the salesman in his approach to the customer, or in what phase of the sale did he go wrong, or was he not following the instructions as previously outlined to him. After that week the man, of course, stays in his territory continuing to sell. The man is supposed to send in daily a report form. This is not only for brand

new men but for men as long as they are with us. This lists every call the man makes, whether he sells them or not, and the reason for this --

THE COURT: "Daily reports," is that what you mean?

A Daily reports.

THE COURT: Don't tell us the reason for it.

A This is really part of the training.

THE COURT: Now you are a witness. Let him run the show.

Q Tell us what the report contained.

A The report contains --

MR. SHAPIRO: I'm going to object to that.

THE COURT: Objection is overruled. I understand this to be general policy. What was done with this particular defendant is another thing.

A The reports contained the name and address of every customer he called on that day, and normally possibly twelve calls a day, the products that were talked about, the individual that he talked to at the customer's location, any information that was sort of unique with this customer.

For instance, if the customer happened to be a nut on fishing -- well, things like that. Now the reports come into the particular company office. One copy of the report is just used administratively. The second copy of the report goes to the Sales Manager's office that is responsible for the training of the man. This Sales Manager is supposed to review these weekly, and staying in at least weekly contact with the salesman by telephone and going over these reports with him, the type of accounts he is calling on, the type of products he is presenting, things like that. Three weeks, let's say, after that training trip, or a month after that training trip that the manager had with the man, he will normally be back with the man in his territory again for probably four days, and in some cases three days, whatever the man might need. He is constantly staying in touch with that man. A manager normally has fifteen salesmen that he is responsible for, and this is his entire work, is to continually motivate and train these salesmen.

Q Who was Mr. Goldstein's manager?

A Mr. Harold Kimmel.

Q Was that during the entire time that Mr. Goldstein was employed by the company?

A I think for most of the time. I am not sure towards the

end that he was the actual manager for the whole time.

Q How long does this process that you have just spoken of take?

A We know on the average that it takes us about a year and a half to put a man in a territory.

MR. SHAPIRO: I will object to his average at this point.

THE COURT: Objection is overruled. Is Kimmel going to be a witness?

MR. WILLIAMS: He is going to be a witness, but he won't arrive until eleven o'clock.

THE COURT: I don't care when he arrives. All I want to know is if he is a witness.

MR. WILLIAMS: Yes.

Q At my request, have you computed the average cost to train a salesman?

A Yes, I have.

MR. SHAPIRO: I will object to an average cost.

THE COURT: Objection is overruled. I will take the proof, and whether or not this particular defendant got that training is another

question. It would depend upon other proof.

MR. WILLIAMS: Yes, Your Honor.

Thank you.

Q Would you tell us what the average cost is?

A Can I read from my paper?

Q Yes, you may.

A The yearly cost, continuing cost, and this is just for the brand-new man, we average out at $4,936.

THE COURT: Before he gives the ultimate figure, we would like to know how he computes that.

THE WITNESS: This is from the company books.

THE COURT: You run the show. Don't let this witness carry it away. You control the examination. I want you to control the examination.

MR. WILLIAMS: Yes, Your Honor.

BY MR. WILLIAMS: (Continuing)

Q Mr. Piassick, tell us how you arrived at the figure before you give the figure?

A The figures were taken from the company's general books, their general ledger, the items which pertain strictly to sales management, such as sales managers' salaries,

sales meetings costs, sales managers' travel expense, the payroll, overhead of sales managers, the travel reimbursement to a man to go into another territory, the new man going into a different man's territory. This was all totaled up and divided by the average number of men that we had during the fiscal year, April 30th of 1973.

Q What is that cost?

A $4,936.

Q Are there any other expenses which are not included in that figure?

A Yes, there are.

Q Tell us how they are computed and then tell us what those expenses are.

A These were computed the same way, by taking the cost of these items and dividing it by the average number of men employed during that particular year, the same year that we are taking the expenses off the books. One is the samples supplied to the man, which approximate $150 per year. The others would be sales supplies in the form of the presentation books, the literature on new products, such as that. That comes to $371.

Q Are there any other additional expenses?

A As far as the new man was concerned, the cost of interviewing.

Q How much is that expense?

A $1,273.

Q So are those all of the expenses?

A In hiring and training a new man that first year.

Q Is there a total of all the expenses?

A Yes, $6,730.

THE COURT: Do I understand that to be the total figure you have just given?

MR. WILLIAMS: Do you want me to ask him that question?

THE COURT: I asked him.

THE WITNESS: That is the total of the four items that I read off of this list. That is the average cost of training, the average cost of supplies.

THE COURT: The average cost of training, that means the entire cost of training one man, and you take an average?

A Yes, sir, for one year.

THE COURT: You don't train him every year, do you?

A It is a continuing thing. We took the total management costs, or I took personally the total managements costs of the items I called out and divided it, averaged it on

the basis of our men employed during that year. Not all of these men were new. If anything, the newer man gets more training than the older man.

THE COURT: You say, "if anything." That is when you need training, at the beginning. Goldstein was there ten years. He didn't need training after ten years, did he?

A It is a lesser amount, but it is a continual thing. In our sales method, it is continual. In any good sales company, it is continual motivation.

THE COURT: Never mind about the others. We don't want your philosophy. You are here to give factual evidence, not your opinion.

Q Do new products develop as the time passes?

A Yes, year in and year out certain products are dropped and certain products are added.

Q And are the salesmen instructed on that?

A Yes, they are.

Q How are they instructed?

MR. SHAPIRO: I'm going to object. He has no personal knowledge of this.

THE COURT: Objection is overruled.

THE WITNESS: Normally, at sales

meetings and in literature, the new products will be demonstrated by someone from our product or lab department. The products will also be demonstrated by the sales managers at these meetings. These will be a seminar-type or a full-blown sales meeting.

Q How many such sales meetings are there a year?

A Normally, three.

Q In your capacity as Treasurer of the company, do you from time to time receive reports from the salesmen?

A Yes.

Q What do those reports consist of?

A Coming into the administrative area that I am responsible for would, of course, be these daily reports and their actual orders taken from the customers.

Q And do you send, in turn, reports out to the salesmen themselves?

A Well, let's say not directly. The information that we gather from the daily reports that the salesmen send in, they are not only looked at first-hand by the sales manager, who gets a copy at the time, but we gather the information on a day-by-day basis putting it down in a monthly form, recapping it and --

THE COURT: All we want to know, and

* * * * *

want to know the basis for it.

MR. WILLIAMS: Yes, Your Honor.

Q Tell us how you arrived at that figure, Mr. Piassick, before giving the figure.

A We run monthly, and have so for a number of years, what is called a Salesman Performance Report, which breaks down to the actual individual salesman his own sales, his own cost of sales, his own cost of commission, his own cost of overdraw, his own training allocation and plus an allocation per man of all of the company overhead in order to arrive at a net profit as we would for the entire company. I looked at his for 1971, and it was the last full calendar year that Mr. Goldstein was with us --

MR. SHAPIRO: Your Honor, he is testifying to records that he does not have and he apparently does not intend to submit to us, and he has taken generalizations and averages again against this defendant.

THE COURT: Objection is overruled.

Q Have you told us all the individual details which you analyzed in determining what the profit figure was?

A Yes, sir.

Q Could you tell us, please, what the profit figure was?

A The profit percentage for 1971 was 25.7 per cent pre-tax

profit on net billing of $67,510.

Q And in that year, do you know what the commissions were paid to Mr. Goldstein?

A 1971 his W-2 reflected an amount of $19,117.

Q Now could you tell us whether you have used the same techniques in computing what the average salesman returns to the company in terms of percentage?

MR. SHAPIRO: Objection. It is irrelevant.

THE COURT: Objection is overruled.

A Yes.

Q What is that figure?

A It is 20.3 per cent.

Q So Mr. Goldstein's return to the company was five per cent more than the average salesman, correct?

A Yes, sir.

THE COURT: I want to know if I properly understand this. You mean he earned in commissions during the year 1972 that was up to his last sale in July, $19,000 approximately?

A No, sir. That was 1971.

THE COURT: Oh, 1971.

A His last full year.

THE COURT: This is the full year or last full year?

A Yes.

THE COURT: 1971?

A Yes.

THE COURT: All right.

Q Do you know what his figures were for 1970?

A The sales figures, his earnings or what?

Q His commission figures.

A His W-2 would have reflected $19,317.

Q Do you know what his figures were for 1970?

A That is what I just gave you.

Q Excuse me, 1969?

A $33,735.

Q Do you have figures for other years?

A Yes, I do.

Q For earlier years?

A I have them back to 1966.

Q Tell us what they were in 1968, 1967 and 1966.

THE COURT: Take one at a time.

A In the calendar year 1968, it was $26,132; 1967, $25,047; 1966, $21,147.

Q When Mr. Goldstein left the company, did you recruit a new salesman for his territory?

* * * * *

A I think I said everyone except the home consumer is a potential customer.

Q Right. You said you don't sell to the home consumer directly, and every apartment and home consumer probably wouldn't know your name, then?

A That's correct.

Q But among the people who do buy these products, the name would be well known, would it not?

A From the individual purchaser, no. Let me explain that. Eastman Kodak might be purchasing our goods, but basically, only the maintenance man who might be placing that order would know our name.

Q Would you say that anybody who uses maintenance supplies would know this?

A No, not everyone that uses maintenance supplies. There are thousands of people in our business, or thousands of companies in our business.

Q How much of your market, your potential market, does the company reach?

A You mean what percentage of the market do we have?

Q Yes.

A I would say we don't have one per cent. We have never made a study of it. If I can elaborate, we do have financial analysts coming in from banks and so forth --

* * * * *

A Yes.

Q Can you tell us the date on which Mr. Dougherty started to work?

A I don't recall. It was some two to three months after Mr. Goldstein left the company, which would place it in the fall of 1972.

Q The company could have added ten men to that territory, could it not have?

MR. WILLIAMS: Objection, Your Honor.

THE COURT: Objection is overruled.

A It could have.

Q It could have added ten men before Howard stopped working, couldn't it have?

A It could have.

Q And certainly it could have even after he stopped working, they could have put ten men into that territory?

A Yes.

Q Do you know what result there was when Mr. Dougherty started to work, when you put a new man in here, Mr. Dougherty, specifically? What happened?

MR. WILLIAMS: I object to that question, Your Honor.

THE COURT: I don't know what you mean by "what happened"? I suppose he went out

and sold products. Is that what you mean?

MR. SHAPIRO: I will try to be more specific.

Q Did Mr. Dougherty take over, generally, the area of Howard Goldstein in selling?

A I'm not sure of the exact territory that Mr. Dougherty has. It is the approximate area.

Q You have given us statements for Howard Goldstein. Have you taken a look at the statements of Mr. Dougherty at all?

A Yes, I have.

Q Do you know what his sales were since he started to work?

A They would average about $5,000 a month.

Q As compared to what, for Howard Goldstein, in the last, approximately, a year?

A Could I have my notes back, and I will be able to answer you?

(Pause in the Proceedings.)

THE WITNESS: I happened to compute an average for Mr. Goldstein on here, which is $6,069 per month, which is for a five-year period of time.

MR. SHAPIRO: Would you mark this for identification?

Q Can you tell, Mr. Piassick, what would be the lastest month

in which Mr. Dougherty's sales figures are available, as far as you know?

A As far as I know, his commission statement is available through October and November is scheduled to go out. It is normally the 12th of the month following.

Q Where is Mr. Dougherty now, do you know?

A I don't know Mr. Dougherty.

MR. SHAPIRO: If it please the Court, I can lay a foundation for this, month by month in figures, but it would be a lot faster, I think, if we tried to agree --

THE COURT: You don't have to get my approval. You have to get your opponent's approval.

MR. SHAPIRO: All right, Your Honor.

(Discussion off the record.)

Q Mr. Piassick, I show you a graph, purporting to compare the comparison of gross sales between Mr. Goldstein and Mr. Dougherty beginning in September, 1972, and ending for Mr. Dougherty for the month of October, 1973, and for Mr. Goldstein ending in the month of November, 1973. That is just last month, and there is a black line on here which represents the gross sales for Mr. Goldstein during that period of time and a red line showing the gross sales for

Mr. Dougherty. Now I will get you the Exhibit, if you want to compare these numbers --

THE COURT: It seems to me that the person who prepared this ought to tell what it is.

MR. SHAPIRO: All right, Your Honor.

THE COURT: Did you prepare it?

MR. SHAPIRO: I prepared it.

THE COURT: You should be a witness, then. An Exhibit is brought in here, and we don't know who made the Exhibit, but now pursuant to my question, you prepared it?

MR. SHAPIRO: Yes.

THE COURT: But the person who prepared it, whoever it was, ought to tell what it is and how he prepared it before it is used in the case.

MR. SHAPIRO: Very well. I would like to submit to the Court that on the basis of figures supplied to me by the defendants' attorney --

THE COURT: Whatever you say is not evidence unless you are sworn as a witness.

MR. SHAPIRO: May we interrupt this

witness' testimony for me to introduce this chart. Counsel will not stipulate to it.

THE COURT: You've got to prove it in some way.

MR. SHAPIRO: All right, Your Honor. May we interrupt this witness, then?

THE COURT: Go ahead.

(Witness temporarily excused.)

MR. WILLIAMS: Your Honor, if my adversary is going to put in a graph which he has prepared for the defense's case, as a witness, while I am on the plaintiff's case, then I am going to object to his testifying.

THE COURT: There isn't anything magic about a lawyer in the case. He is a witness like anybody else.

MR. WILLIAMS: Yes, Your Honor, but we are now on the plaintiff's case. Mr. Shapiro proposes to testify, or the defense now proposes to offer evidence which it has prepared in the defense of its own case. That evidence should be offered in its own case and not on my case.

THE COURT: Listen, I'm not impressed at all about the order in which the proof goes

in. It is the same case. I would just as soon receive it now as tomorrow morning.

The objection is overruled.

MR. SHAPIRO: Your Honor, if we can take a five-minute recess, perhaps I can demonstrate --

THE COURT: I'm not going to take any more recesses. We have got time for only one recess in the afternoon.

MR. SHAPIRO: All right, Your Honor, but I thought it might be easier to stipulate.

S A N F O R D R. S H A P I R O,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBAUM:

Q Mr. Shapiro, I show you a graph which is marked Defendants' Exhibit 5 for identification and ask you if you can tell the jury what this is.

A Yes, I can. This is a graph that I've prepared, based upon figures of gross sales for James Dougherty from the period October, '72 through October of '73, and those figures on which I based this graph indicated by the red line were supplied by Neil Young, the attorney from the firm of

Tobolowsky, Schlinger & Blalock, and I took the figures indicated by the black line from Mr. Goldstein for the period September, '72 through November, '73, from the commission statements, again, that were supplied to me from the plaintiff's attorney. These figures were compared by us at an examination before trial and that is where I got these figures from.

MR. ROSENBAUM: Your Honor, I offer this into evidence.

MR. WILLIAMS: Your Honor, I object. The sales that Mr. Dougherty may have made have no bearing on this case. We are talking about the contract that Mr. Goldstein signed with the plaintiff and what profits were made on Mr. Goldstein's sales.

THE COURT: Objection is overruled.

MR. WILLIAMS: May I ask some preliminary questions, Your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. WILLIAMS:

Q Tell us what those figures are again that you compared?

A These are the gross sales from Mr. Dougherty, James Dougherty, as supplied to me by the attorney for your

client, USAchem, and they show sales from October, '72 through October, '73.

Q Do I understand that you have projected on that graph, Mr. Goldstein's sales for the precise same period?

A That's correct, as it was agreed to at the examination before trial.

Q Now, Mr. Shapiro, the black line, as I understand it, is Mr. Goldstein's sales as you have put it on this chart?

A Yes.

Q And the red line is Mr. Dougherty's sales?

A Yes. I made it up last night in my office.

Q As you put it on the chart?

A Yes.

Q Is this Mr. Goldstein's total sales or sales of competitive products on this?

A Total sales.

Q That includes competitive as well as non-competitive products?

A Total sales.

Q What were his total sales from September of '72 through November, '73?

A Those figures are on the yellow sheet. I will have to give them to you month by month. We will start with August, '72--$1,494.85.

Q And that does not appear on this chart, does it?

A No. I missed the first month. You are correct. I missed the first month.

Q What is the next month?

A September, '72, $3,214.04.

Q What percentage of those sales were chemical specialty products and what sales were non-specialty chemical products?

A I only have gross sales here.

Q What is the highest sales month that Mr. Goldstein had in this period?

A It appears to be the month of September, '73, $6,197.80.

Q Do you have for any month a breakdown as to what proportion of those are chemical specialty products and what proportion are non-specialty?

A I only have gross sales, as I have indicated on there.

Q Have you determined what proportion of those are to customers of USAchem and what proportion are not?

A I only have gross sales as indicated.

MR. ROSENBAUM: Your Honor, I again ask that the Exhibit be introduced into evidence.

MR. WILLIAMS: Your Honor, may I have a moment to speak to Mr. Gates?

THE COURT: Yes.

(Discussion off the record.)

MR. WILLIAMS: Your Honor, I would like to ask Mr. Shapiro a few more preliminary questions.

THE COURT: All right.

VOIR DIRE EXAMINATION CONTINUED

BY MR. WILLIAMS:

Q Are the figures on this chart gross sales?

A Yes.

Q Do they include cost of sales?

A It is gross sales.

Q Can you answer the question, please?

A I am trying to. It is gross, which means without any expenses -- gross sales.

Q And it is before taxes and not after taxes?

A Correct, gross sales, and as it says on the chart for both of them, and again, I have no first-hand knowledge of the figures. Those are the figures that the attorneys agreed to. You were not there, but I understood that the attorneys agreed to them at the examination before trial.

Q Isn't it true that one of these sets of figures are for your own client, correct?

A That's right.

Q Do you know what your own client deducts from his gross sales in terms when he arrives at his net figures?

A I do not.

Q Do you know what the profit margin is?

A I do not.

MR. WILLIAMS: That is all.

(Witness excused.)

MR. WILLIAMS: I object to it.

THE COURT: The objection is overruled. It is received in evidence.

(Defendants' Exhibit 5 marked in evidence.)

A L L E N P I A S S I C K,

resumed the stand, having been previously sworn, testified further as follows:

CROSS EXAMINATION CONTINUED

BY MR. SHAPIRO:

Q Mr. Piassick, I show you Defendants' Exhibit 5 now in evidence, and I ask you if the company ever made a study based on the figures that were supplied at the examinations before trial as to the gross sales of Mr. Goldstein as compared to the gross sales of Mr. Dougherty?

A No. Excuse me, but when you say, "a study," what do you mean?

Q Comparison study.

A No comparison study. Since you had asked for the commission

* * * * *

THE COURT: This is an entirely different matter?

MR. SHAPIRO: Yes, an entirely different matter. We are going to the employment form now.

Q Now there was an eighteen-month provision, and I believe you testified that the purpose was that that was the time required to train the average salesman, or the average time required to train a salesman?

A Yes, sir, between twelve months minimum -- on the average, about eighteen months.

Q How long has the company been using this contract?

A The Sales Representative's Agreement?

Q Yes.

A I would say for as long as I can remember, which is eleven and a half years, and I am sure it was there for a certain number of years previous, but I don't know.

Q Has any other time period ever been used in this form of contract by the company, to your knowledge?

A Since I have been with the company, I think it has been eighteen months. It could have been a different time, at an earlier time.

Q In any event, the eighteen months was set up before you arrived?

A I think it was.

Q But you are testifying now that, to your knowledge, that is the time required to train a new salesman?

A Right. When you first come into a company, you don't acquire all the knowledge the first day you get there, and a lot of things you acquire over a period of time. I really don't know what was in effect.

THE COURT: Let's get this wrapped up. As long as you have been there, it has been eighteen months?

A As far as I know.

Q Do you know who made that determination?

A The company did, and I assume along with Mr. Tobolowsky.

MR. SHAPIRO: I have nothing further, Your Honor, except at this time I would move to strike his testimony as to what the purpose of that eighteen-month provision was, because I think it is clear that he doesn't know the purpose of it.

THE COURT: Motion denied.

MR. WILLIAMS: Would you mark this for identification?

(Plaintiff's Exhibit 7 marked for identification.)

* * * * *

customers that you sold while you were employed by the Plaintiff?

"A I didn't. I really don't know.

"Q Would it be more than 90 per cent?

"A I don't think so.

"Q More than 75 per cent?

"A Yes.

"Q Of the $25,000 that you have sold since you have been in business, sir, how much of it has been within the territory that you were assigned while you were with the Plaintiff?

"A Probably 75 per cent."

MR. WILLIAMS: Now going to Page 21, Line 15. (Reading):

"Q Are you continuing to sell to customers that you sold while you were with the Plaintiff?

"A Yes.

"Q Do I take it that, from what you are saying here, unless a court enjoins you, it is your intention to continue to sell to the customers you sold to when you were employed by the Plaintiff?

"A Yes.

"Q And you intend to continue to sell within your former assigned territory when you were employed by the

* * * * *

"Q I understand that.

"A I gave you '64 as $18,000; '65 as $20,000. '66 you didn't ask me, but '66 was about $24,000. '67 was about $26,000. These are all gross figures.

"Q Did you continue to work in 1968?

"A Yes, sir.

"Q Did you continue to sell customers within your assigned territory?

"A Yes, sir.

"Q Did Mr. Kimmel continue as your Sales Manager or Sales Supervisor?

"A Yes.

"Q Were you selling to approximately the same accounts as you sold in previous years?

"A Yes, sir.

"Q Did you open some new accounts?

"A Very few, if any."

Page 66, Line 15. (Reading):

"Q Did you continue to attend sales meetings in 1968?

"A Yes, sir.

"Q Do you know what your approximate earnings were then?

"A About $30,000.

* * * * *

Honor, Page 69.

THE COURT: I will sustain the objection.

MR. WILLIAMS: Page 69, Line 21.

(Reading):

"Q Did you receive monthly commission statements in 1970?

"A Yes.

"Q You were ill for approximately three months in the first part of that year, sir?

"A Yes, sir."

MR. SHAPIRO: I have an objection to the next question. It is irrelevant.

MR. WILLIAMS: That is Line 3, Your Honor, on Page 70.

THE COURT: That is the same matter as before. I will sustain the objection.

MR. WILLIAMS: Page 70, Line 5.

(Reading):

"Q Were orders being sent in by you?

"A There couldn't have been. I was out of work.

"Q So, there were no -- "

MR. SHAPIRO: Objection to the next question because it follows from the prior ob-

jection that the Court sustained.

THE COURT: What line number is that?

MR. WILLIAMS: Line No. 7.

THE COURT: This refers to advances, draws. I will receive it.

MR. WILLIAMS: Page 70, Line 7.

(Reading):

"Q So there were no commissions being earned by you, but you received checks?

"A Yes, sir.

"Q At the end of this illness, did not your monthly commission statements reflect that you were in a debit position?

"A Naturally."

MR. SHAPIRO: Objection to the next question.

MR. WILLIAMS: That is Line 13, Your Honor.

THE COURT: I will sustain the objection.

MR. WILLIAMS: And Line 16 on Page 70 --

MR. SHAPIRO: That is the same thing.

THE COURT: Why don't you get together

on this and show me the questions you object to, and I will rule on them all at once, instead of this piecemeal business. Well, as long as we started this, we will have to go through with it now, but if you have got any further matters of this kind, let me know beforehand what you object to. Then I can rule on it and I won't have to interrupt the reading.

MR. WILLIAMS: What is the objectionable line?

MR. SHAPIRO: It is the same point --

THE COURT: All I want to know is the line number.

MR. WILLIAMS: What line number is it?

THE COURT: What are you objecting to?

MR. SHAPIRO: To the last point --

THE COURT: That is what I want to know. What is the last point?

MR. SHAPIRO: Line 16, the same point that was just sustained earlier.

THE COURT: Line 16?

MR. SHAPIRO: Yes.

THE COURT: Well, it is unintelligible to read that without knowing what went before.

I will sustain the objection.

MR. SHAPIRO: If he is going to read after Line 18, it is the same point again. It is the questions in this series, the same thing.

THE COURT: I will sustain the objection to all the matter on that page following Line 18.

MR. WILLIAMS: Page 71, Line 1.

(Reading):

"Q Do you recall when you went back to work?

"A Approximately sometime in April of '70.

"Q Did you continue to work the remainder of 1970?

"A Yes, sir.

"Q -- in the manner in which you had worked in the past?

"A I don't think I had as much enthusiasm, no. No, I didn't.

"Q What was the change, then, sir?

"A I wanted to quit Chemsearch.

"Q Did you have any discussions with Mr. Kimmel about quitting?

"A Yes.

"Q What were those discussions?

"A I told him that I just was disenchanted with the

* * * * *

And to refresh the recollection of the Court and jury, Line 3 reads:

"Q Did you attend any of them in Dallas?

"A -- or was that in 1972? I think that was in '72

"Q All right, sir. Now, in 1971, did you have any illness?

"A '71? Yes, sir, -- no. '70, I will ill.

"Q 1970 was the gall bladder operation?

"A Right.

"Q In 1971 was there any illness?

"A I don't recall any."

Page 82, Line 2. (Reading):

"Q In 1972 did you have any illness?

"A Yes.

"Q What was that, sir?

"A I don't know. I was admitted to the hospital, emergency. They thought I was having a heart attack. I was in intensive care, cardiac care unit, for close to a week.

"Q Did you have any cardiac involvement?

"A It was ruled out, but at the time I was brought in, it appeared as if I was having a heart attack."

Page 84, Line 18. (Reading):

"Q When did you first start thinking about going

* * * * *

"A No, I wouldn't say 'personally,' -- well, yes, of course, one source in particular, my cousin, who happened to be in business at the time, manufacturing some chemicals. I know him, personally, of course.

"Q Did your cousin know by whom you were employed at the time you were talking to him?

"A Yes."

Page 92, Line 4. (Reading):

"Q Did you have any discussions with any other salesmen that worked for the Plaintiff at that time about going into business for yourself?

"A During what time period?

"Q This is June, July, or August.

"A Yes, in August.

"Q Who did you talk to?

"A I talked to some Chemsearch men.

"Q Who were they, sir?"

MR. SHAPIRO: Excuse me, but this was not in the portion that we discussed. I believe you started on 93.

THE COURT: I recall this. I will overrule the objection. I will receive it.

MR. SHAPIRO: I'm sorry.

MR. WILLIAMS: The question again is on Page 92, Line 12. (Reading):

"Q Who were they, sir?"

And the answer is on Page 93, Line 13. (Reading):

"A I talked with Herb Mitzner, possibly; with Roy Raker, with Jim Zampino, Mel Waldman, Mel Wilcove. I don't think there were any other fellows.

"Q Did you know each one of those gentlemen by virtue of your being employed by the same company?

"A Yes.

"Q Did you know that each one of them had signed a Sales Representative's Agreement, the same as you had?

"A I had no idea what they signed.

"Q You didn't discuss that with them?

"A I think there may have been questions brought up about a contract, but I don't know if that was with all of them or with any one of them in particular. I don't recall.

"Q Didn't any of them say to you that you had an agreement that had some post-employment covenants in it?

"A They asked me -- I think one of them did -- 'Didn't you sign a contract?' I said, 'I signed something. I don't recall what it was.' I mean, everybody talks about a

* * * * *

carpet items?

"A I doubt if they amount to five per cent. Again, I don't know.

"Q Approximately ninety-five per cent of your sales have been chemical specialty items?

"A That's correct."

MR. WILLIAMS: Now I'm going to Line 4 on Page 12. (Reading):

"Q Are they the same kind of products that you sold while with USAchem?

"A To me, that is the same question. I would say they are not because I am on the other side of the fence. I feel they are better and different.

"Q You are talking about quality as opposed to difference generically?

"A Probably generically, they are in the same family.

"Q Same uses?

"A Same applications, maybe additional applications."

Page 13, Line 6. (Reading):

"Q Mr. Goldstein, I'm going to hand you what has been marked Exhibit 1 for identification and ask you to identify the customer on that document.

"A Town of Benton Highway Department, Penn Yan, New York.

* * * * *

"Q Did you fill out your daily reports?

"A At that time I may have stopped sending in daily reports.

"Q Did Mr. Kimmel contact you and tell you to send them in?

"A He said, 'It's not necessary.' That may not have been in '67 -- it probably was '67; I can't be sure of the year, but at some time I stopped sending in daily reports."

MR. SHAPIRO: I'm going now to Page 62, Line 9. (Reading):

"Q So you had a relationship with those present customers that made it very easy for you to have repeat sales with them?

"A Nothing is easy in this business. Every day is a new ball game. There is nothing for sure -- whether your customer is going to run out and you don't get your order. It's a very competitive business. I really feel I built nothing. Every day is a new grind."

That is all I have at this time.

N E I L E. Y O U N G,

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

Excerpts from Trial Testimony.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Where do you reside, Mr. Young?

A Dallas, Texas.

Q What is your line of work?

A I am an attorney.

Q By whom are you employed?

A Tobolowsky, Schlinger & Blalock.

Q How long have you been so employed?

A Four and a half years.

Q Have you attended law school?

A Yes.

Q Where did you go to law school?

A The University of Texas, at Austin.

Q Did you go to college?

A Yes.

Q Where did you go to college?

A Texas University in Lubbock, Texas.

Q When did you graduate from college?

A 1966.

Q When did you graduate from law school?

A 1969.

Q Are you a member of the Texas Bar?

A Yes, I am.

Q In the course of your work as an attorney, have you examined books of accounts and records of corporations who are clients of your firm?

A Yes, I have.

Q At my request, have you examined the corporate records produced by Mr. Goldstein at the examination before trial?

A Yes, I have.

Q At both examinations before trial?

A Yes.

Q Have you compared the records produced by Mr. Goldstein with the records in the possession of the company regarding his sales during the period when he was employed by the company?

A Yes, I have. I have compared invoices produced by Mr. Goldstein at the taking of his two depositions, and with his customer list that he had while he was employed with USAchem, to determine the number of sales that Mr. Goldstein made for his own company, that corresponded with customers that he serviced while he was with USAchem.

Q How many sales has Mr. Goldstein made to customers of USAchem since he left the employment of USAchem?

A For the period August 29, 1972, which was the date of the first invoice that he produced, through November 27, 1973, which is the date of the latest invoice that he has pro-

duced for us, he has made 282 sales to customers that he serviced while with USAchem. There is an additional invoice, No. 624, which I was unable to determine the customer on, so I can't testify as to that invoice.

Q How many sales did Mr. Goldstein have during that period?

THE COURT: You mean total in money?

Q Total in number of customers.

A Right. Total number of sales for Gold Seal Associates, there is 346 sales plus this additional invoice.

Q What percentage of those sales were to customers of USAchem?

A Approximately eighty-one per cent.

Q What proportion of the total sales were made in the territory assigned to Mr. Goldstein?

A Approximately ninety-five per cent.

Q And what proportion of sales to customers were of products similar to those sold while he was with USAchem?

MR. SHAPIRO: Objection. It calls for a conclusion.

THE COURT: Objection is overruled.

A Of the invoices produced by Mr. Goldstein, there were some invoices that included sales of what were listed as polymats, which were carpet items. Those amounted to approximately four to five per cent of his business. So the other ninety-five per cent of his sales, which are not included

in my figures, are of chemical specialty products.

Q What is the total number of violations of Exhibit 1?

MR. SHAPIRO: I object.

THE COURT: I will sustain the objection. I sustain the objection because you concluded they were violations. That is a question of law that I will determine.

Q Here is Exhibit 5, Mr. Young. Have you had an opportunity to examine that?

A Yes, I have.

Q Have you compared the sales projected on this Exhibit for Mr. Goldstein with the sales which he produced at the deposition?

A Yes, I have. I was provided additional information by Mr. Shapiro, to give me a better idea of the volume of sales that he was projecting to Mr. Goldstein on this chart. The figure given me by Mr. Shapiro was for Mr. Goldstein's total sales during the period of that chart was $57,422.25.

Q What is the total sales projected on this chart?

A That is the figure projected on that chart.

THE COURT: Sales by Goldstein?

A Yes; however, I used the same figures that were provided to me by Mr. Shapiro and calculated them and came up with $67,579.19 in sales.

Q What is the difference?

A A little better than $10,000.

Q Is that more?

A Yes, it is.

Q So the black lines on this Exhibit should be higher, is that correct?

A Well, the figures that Mr. Shapiro used are $10,000 less than I calculated them to be.

MR. WILLIAMS: You may inquire.

CROSS EXAMINATION

BY MR. SHAPIRO:

Q Mr. Young, where are the differences? If there are, I certainly want you to point them out on this Exhibit.

A I can determine from the preparation of the chart you have tried to tried to project on the chart on a monthly basis, Mr. Goldstein's volume for each month.

Q Yes, and it was noted on my examination that we had inadvertently omitted the first month, and it was about $1,500, August, '72. Are you counting that in your ten thousand?

A Yes, I think I am. These are the figures that you provided me yesterday. Now this chart does not purport to give total sales volume, and to that extent, it is impossible to tell what you are comparing among the two. As I see it, it is just a monthly comparison of sales volume between

the two men.

Q Mr. Young, let's take the month, for example, of February, 1973, and that shows Mr. Goldstein's level of sales at somewhere around $5,900; is that the figure you got from me here?

A (No response.)

Q These are your notes, I take it?

A February, 1973, $5,965.66.

Q Let's take July, 1973, and this shows approximately $4,200 in sales by Goldstein. What is the figure I provided you with there?

A $4,298.24.

Q Mr. Young, is USAchem the largest client of your firm?

A Perhaps you can elaborate on the question.

Q Let's take in gross sales a hundred million dollars a year for the last fiscal year. Is that the largest client that you service?

A No.

Q How many men are in your firm?

A We have a ten-man firm.

Q How about in gross fees paid to your firm? Is this the largest client you have?

MR. WILLIAMS: Objection.

THE COURT: I will sustain the objection.

MR. SHAPIRO: I'm showing "interest."

THE COURT: I know you are, but you can show it without showing figures.

This is a substantial client of your firm?

A Yes, it is, Your Honor.

Q Would I be correct in saying that you, personally, are involved in litigation of many cases like this? Would that be correct?

A I've had some involvement, yes.

Q Let's take your firm. About how many over the last five years?

MR. WILLIAMS: Objection, Your Honor.

THE COURT: You say "litigation of this sort." Do you mean involving this particular contract?

MR. SHAPIRO: The same type of form, or substantially the same type of form contract.

THE COURT: We are talking about a Sales Representative's Agreement, which I understand is standard form for all salesmen?

A Correct.

THE COURT: That is the kind of litigation he is talking about.

A Yes.

THE COURT: All right.

Q About how many times has it been litigated by your firm, to your knowledge?

A I have no idea.

Q More than once?

A Yes.

Q More than ten times?

A Yes.

Q More than a hundred times?

A I don't know that.

Q It is important that your firm win these cases, is it not?

MR. WILLIAMS: Objection.

THE COURT: I don't suppose he would be here if it wasn't.

Q On the question that I asked you about the number of times you have litigated over this contract or one substantially similar to it, I may have mislead you by saying only the last five years. I mean, to your knowledge, how much has your firm litigated on behalf of this client with this type of contract, to your knowledge, at any time, and not only the last five years, and would it be a hundred or more clients among --

THE COURT: In the first place, do

you know? Because I could guess, and I wouldn't know anything about it.

THE WITNESS: I do not know.

MR. SHAPIRO: Would you mark this for identification?

(Defendants' Exhibit 7 marked for identification.)

Q Mr. Young, I show you D-7 for identification purporting to be a letter from Edwin Tobolowsky to Mr. Howard Goldstein and dated October 13, 1972, under the letterhead of Tobolowsky, Schlinger & Blalock, and I ask you if you have ever seen that letter or that same form of a letter before?

A I have seen a Xerox copy of this letter.

Q Have you ever seen that, substantially the same letter, before, as to any other employees of this company?

A I have seen letters that accomplished substantially the same purpose.

Q Now you have testified, to your knowledge, as I understand it, as to how many times your company litigates this type of claim against a former employee. Can you tell me how many times this type of letter goes out to make these claims against employees?

A No, I can't.

Q Would it be more than a hundred, would you say?

A Mr. Shapiro, I really don't know.

Q How long have you been with this firm?

A Five years.

Q And how many people in the firm are involved in this type of litigation for USAchem?

A Mr. Tobolowsky and I are the ones that participate in this type of litigation.

Q Have you been generally involved in this type of litigation for the past five years?

A Not really. I have participated in this type of litigation within the last three or three and a half years.

Q Are you able to tell me whether it is the practice of your firm with all former employees of this company to send out substantially this type of a letter?

A Not all former employees, no.

THE COURT: The trouble is, I don't know what that letter talks about, and I am sure the jury doesn't, because they haven't seen it.

MR. SHAPIRO: Perhaps I can read it.

THE COURT: It isn't in evidence.

MR. SHAPIRO: I will offer it.

THE COURT: Let me see it first.

(Defendants' Exhibit 7 handed to the Court.)

THE COURT: All right. You are offering it in evidence?

MR. SHAPIRO: Yes.

THE COURT: Have you seen that before, Mr. Williams?

MR. WILLIAMS: I have seen a copy of it, Your Honor. I have never seen this particular document. I have no objection to it.

THE COURT: It is received in evidence

(Defendants' Exhibit 7 marked in evidence.)

(Mr. Shapiro read to the Jury from Defendants' Exhibit 7 in evidence.)

BY MR. SHAPIRO: (Continuing)

Q I ask you whether you can tell me how often in your experience your firm was called upon to write such letters by USAchem to former employees of that company?

A No.

Q You cannot tell me approximately how often?

A No, sir, I do not handle that.

Q Would such a letter go out in virtually every litigation that you have?

THE COURT: I can't see what bearing that has on this case.

MR. SHAPIRO: Thank you. I have no further questions.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mr. Young, have you also examined Mr. Dougherty's records?

A Yes.

Q Have you compared them with Mr. Goldstein's records?

A Yes, I have.

Q Can you tell us how many customers did Mr. Goldstein have that were USAchem's customers?

MR. SHAPIRO: Objection.

THE COURT: He has already given it. It is 282, isn't it?

A No, sir. That is different information. That was the number of our former customers that he had sold on behalf of his new company.

MR. WILLIAMS: No. I'm asking him how many total customers he had.

THE COURT: Oh, the total?

MR. WILLIAMS: Yes.

THE WITNESS: Mr. Goldstein, according to his route book that he kept while he was employed --

THE COURT: He gave that figure, too.

It was 346, wasn't it?

A No, Your Honor. That is his total number of sales on behalf of his new company.

Q May I withdraw the question, and perhaps it will be clearer in this form.

How many of USAchem's customers did Mr. Goldstein service when he was employed by the company?

A His route book reflects that he had 237 accounts that he was calling upon.

Q How many of those accounts does Mr. Dougherty now call on?

A Seventy-one.

MR. SHAPIRO: I will object to that last question.

THE COURT: On what basis does he get his knowledge on sales?

MR. SHAPIRO: He testified to the calls by Dougherty --

Q What is the basis of your examination of Mr. Dougherty's accounts, in your opinion here?

A I have taken Mr. Goldstein's route book of customers while he was employed by USAchem and compared that with Mr. Dougherty's route book of customers that he presently services for USAchem, compared the two, and discovered how many of Mr. Goldstein's customers Mr. Dougherty is

presently selling.

Q What is that number?

A Seventy-one.

Q What percentage of the customers that Mr. Goldstein serviced when he was with USAchem is that?

A It is approximately one third, a little less.

MR. WILLIAMS: Thank you.

RECROSS EXAMINATION

BY MR. SHAPIRO:

Q Mr. Young, you don't know how many people Mr. Dougherty calls upon, do you, or do you of your own knowledge?

A No, and that is not what I was testifying about.

Q Of course, and similarly by your own knowledge, you don't know how many customers Mr. Goldstein has called on?

A No, I did not mean to reflect that.

THE COURT: Of course, he couldn't know of his own knowledge unless he was with him.

MR. SHAPIRO: Of course. I just wanted to make that clear.

Q Is there any question on the line of this graph that indicates a sale for Dougherty, as you compared these figures?

A Mr. Shapiro, my question about the graph is that it does not reflect total volume of either gentlemen, and I am merely --

Q Okay, just a minute. You supplied us with some figures on the sales of Mr. Dougherty at my request, did you not, at one of the examinations before trial?

A That's correct.

Q Mr. Young, have you compared the gross sales on the invoices of Mr. Dougherty, which are in evidence as Defendants' Exhibit 6 with the line chart for Mr. Dougherty's sales on Defendants' Exhibit 5?

A I haven't made the comparison with the chart, because I haven't had it available to me.

Q Do you want to do that now?

A No. I am not going to take the time here to make computations.

Q Do you recall supplying us the figures at an examination before trial of Mr. Dougherty's gross sales for October, '72, through August of '73?

A I recall that we produced for you his monthly sales statement, and we may have given you a recap form of type of figures.

Q Then subsequently, at the time this trial commenced, you supplied us with the figures up to last month, is that correct?

A Yes.

Q And you have made no examination of this chart, then, for

that purpose?

A I haven't had it available.

Q Mr. Young, it will be available to you at any time you want it, and if you want to make any corrections, you can make it to the Court.

A (No response.)

MR. SHAPIRO: I have no further questions.

THE COURT: I don't know what that was for, because as far as I'm concerned, he is on his way back to Texas now.

MR. SHAPIRO: No. I think he is going to stay here for this litigation.

THE COURT: I don't know whether he is or not, but I know he doesn't have to, as far as I'm concerned.

(Witness excused.)

H A R O L D K I M M E L,

called as a witness by the Plaintiff, being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mr. Kimmel, where do you live, sir?

A Westport, Connecticut.

* * * * *

Q How long did you serve as a Sales Manager?

A I served as a Sales Manager for six years.

Q What was your position after that?

A Division Manager.

Q What does a Division Manager do?

A A Division Manager has the responsibility of not only handling his own group of salesmen but also handling and supervising Sales Managers.

Q How long did you serve in that capacity?

A For three years, I believe.

Q Did you then take your present position?

A Yes, sir.

Q When was that?

A The beginning of 1970, January 1st, 1970.

Q Do you know Howard Goldstein?

A Yes, I do.

Q When did you first meet him?

A April of 1963.

Q Did you see a sales application for Mr. Goldstein?

A Yes, I did.

MR. WILLIAMS: Would you mark this for identification?

(Plaintiff's Exhibit 8 marked for identification.)

Q Here is Exhibit P-8 for identification --

THE COURT: Wait a minute. That was in evidence before. That is the contract, isn't it?

MR. WILLIAMS: No, Your Honor. It is the application.

THE COURT: What?

MR. WILLIAMS: It is the application. It is Mr. Goldstein's application to work.

THE COURT: Oh, all right.

Q Could you identify that, Mr. Kimmel?

A Yes. This is the application that Mr. Goldstein made out prior to his being hired by National Chemsearch.

THE COURT: Will you keep your voice up, please. I don't want the jury to have to strain to hear you.

THE WITNESS: All right.

Q What is the last page, Mr. Kimmel, of the Exhibit?

THE COURT: How many pages are there? Is that what you want to know?

MR. WILLIAMS: No. I want him to identify the last page, Your Honor.

THE WITNESS: This is a "Temperament Survey." It is a test that Mr. Goldstein took and --

* * * * *

the same date?

A Yes.

THE COURT: I was wrong about that, then. I thought the February date referred, apparently, to the application and not when he signed his part of the contract.

A Yes.

MR. WILLIAMS: Correct, Your Honor.

THE COURT: All right.

Q Now on that date, did you and he have a conversation?

A Which date was that, sir?

Q On the April date?

A Yes, sir. He was interviewed in the New York office, in the eastern building of Rockefeller Center.

Q Was he also tested?

A Yes, sir, he was tested on that day.

Q By whom was he interviewed?

A He was interviewed by Leonard Rosenbaum and myself.

Q Tell us, briefly, the substance of your conversation on that date?

A Conversation or interview?

Q The interview, the talk that you had with him.

THE COURT: That is what an interview is. One side says something, and the other side

says something else. That is conversation.

THE WITNESS: We went into Mr. Goldstein's background and checked out whether he had any success pattern and why he wanted to come to work for us and things of that nature, but in detail.

Q Did Mr. Goldstein reveal what his earnings had been up to that point?

A Yes. They were revealed on his application.

Q Does the application reveal what his annual earnings had been to that point?

A Yes.

MR. SHAPIRO: I make the same objection. This is irrelevant and immaterial.

THE COURT: Objection is overruled.

THE WITNESS: In April, 1960 -- that is what I've got --"April of 1960 to present," meaning that in April, 1963, he worked for the National Sales Company as a wholesale appliance salesman and started at $75 per week and wound up at $150 per week on commission.

Q So that is approximately $7,500 per year?

A Yes, sir.

Q Did he indicate to you that he wished to come to work for National Chemsearch?

A Yes, he did.

Q At that point did you make the decision to hire him?

A Yes, sir.

Q On that day?

A On that day.

Q Did you explain to Mr. Goldstein about the company?

THE COURT: What do you mean "explain about the company"?

MR. WILLIAMS: About the methods of selling, about the products, about the personnel and about the employment?

THE COURT: That is seven or eight questions in one. What is it particularly you want to know about the company.

Q Did you explain the line of products the company sold to Mr. Goldstein?

A Yes, sir.

Q Did you explain to him the methods of selling?

A Yes, sir.

Q Did you explain to him the terms of his employment?

A Yes, sir.

Q Did you show him the employment agreement?

A Yes, sir.

Q Here is Exhibit 1, and is that a copy of the document you showed him?

A Yes, sir.

Q Did you explain the terms of the contract to him?

A Yes, I did.

Q Did he ask any questions about it?

A No, sir.

Q And was the contract executed on that date?

A Yes, sir.

Q By both parties?

A By both parties.

Q In particular, did you explain to him the provision about his termination of employment?

A Yes, sir.

Q Did you also explain to him the fringe benefits offered by the company?

A Yes, sir.

Q Did you tell him about the bonus plan?

A Yes, sir.

Q And about the hospitalization?

A Yes, sir.

Q Tell us, Mr. Kimmel, what hospitalization was offered to sales personnel at that time?

A The company paid for Blue Cross and Blue Shield for the salesmen. If the salesmen wanted it --

MR. SHAPIRO: I will object to this. It is all irrelevant.

THE COURT: Objection is overruled.

THE WITNESS: If the salesman wanted additional coverage for his family, then he paid that himself.

Q Were there any other fringe benefits?

A Yes.

THE COURT: I don't know what your question means, "Were there any others?" Were there others they didn't talk about, is that what you mean?

MR. WILLIAMS: No, that they did talk about. That is my next question.

THE COURT: You didn't ask him that.

MR. WILLIAMS: That is the next question.

THE COURT: Did you talk about any other fringe benefits on that occasion in April, 1963?

A I don't remember.

Q You don't recall?

A I don't remember.

Q When did Mr. Goldstein begin his training?

A Mr. Goldstein began his training at approximately two weeks after the contract was signed.

Q Had Mr. Goldstein had any experience in selling specialty chemicals before?

A Not to my knowledge, no.

THE COURT: We will recess until two o'clock.

(A luncheon recess was taken at 12:45 o'clock P.M.)

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Excerpts from Trial Testimony.

AFTERNOON SESSION

2:00 o'clock P.M.

- - -

(Jury present.)

H A R O L D K I M M E L,

resumed the stand, having previously been sworn, testified further as follows:

DIRECT EXAMINATION CONTINUED

BY MR. WILLIAMS:

Q When Mr. Goldstein came with the company, was he an experienced salesman of chemical specialties?

A No, he was not.

Q During the course of training, did you have an opportunity to observe his experience as a salesman, generally?

A Yes.

Q Describe that to the Court and jury, please.

A As far as our business was concerned, not only Mr. Goldstein, but every one of us who comes into this business, the chemical specialty business, comes from another field for the most part. I think in the last fifteen years, there may have been two or three men that ever were in the chemical specialty field before.

MR. SHAPIRO: I object to it as not being responsive to the question.

THE COURT: Objection is overruled.

THE WITNESS: And because of the fact that we cut --

MR. SHAPIRO: Again, it is not responsive, Your Honor.

THE COURT: That answer is inclined to be discursive.

My understanding is the question was, "Was he an experienced chemical salesman?" That could be answered "yes" or "no."

THE WITNESS: No, sir.

Q Was he an experienced salesman, generally?

A No.

THE COURT: He had some experience as a salesman?

A Yes, sir.

Q So you couldn't answer unqualifiedly that he wasn't an experienced salesman? He had some experience as a salesman?

A He had some experience in the field as a salesman.

Q Describe the course of training of Mr. Goldstein during the first two weeks?

A When a salesman leaves our office, he still has on his mind some doubt --

MR. SHAPIRO: Objection. It is not

responsive to the question.

THE COURT: I will sustain the objection.

Q Describe the training of Mr. Goldstein, please?

A The first week that Mr. Goldstein went out, he went out with another salesman on what we termed "observer training."

Q Where did he do his "observer training"?

A He did it in the area of Cape Cod.

Q With whom did he do it?

A He did it with a salesman by the name of Bob Jacobs.

Q Was Mr. Jacobs an experienced salesman?

A Yes, he was.

Q Tell us what observer training is?

A During that week, because the man has never been in our business, Mr. Jacobs goes through what he would normally do as a salesman in a week's time. He shows Mr. Goldstein the various trades we call on, how they go over pricing, and they go over products, and he sees two things. He sees the difficulty of opening new accounts and how to open new accounts. He also sees the customer rapport that Mr. Jacobs has established over a period of time. He also sees the customer's acceptance of the products, and that establishes in his own mind, as far as our psychology is concerned, that he can be successful in our business.

Q Had you given Mr. Goldstein a sales book or sales material at that time?

A He was given a basic product before he left the office to study for two weeks before he went into the field with Mr. Jacobs.

Q How many product books are there?

A There are two product books.

MR. WILLIAMS: Would you like these marked, Your Honor? I don't propose to offer them.

THE COURT: I don't know how you are going to use them, so I don't know whether they need to be marked or not.

Q Mr. Kimmel, I hold two books in my hand, and they are blue. One is a large book and one is a small book.

A Yes, sir.

Q Are these the sales books?

A The large book is the sales book that the salesman would use in front of a customer.

Q Was he given that book at the beginning of his training period?

A Within a two-week time, he is given a lot of confidential information that at that time --

MR. SHAPIRO: I will object to the

characterization of "he is given a lot of confidential information."

THE COURT: Objection is overruled.

THE WITNESS: That was part of the material that Mr. Goldstein received within a two-week period of time.

Q Was he also given the small book?

A The small book was given to him in the office after he was hired.

Q What is the small book? What is the purpose of it?

THE COURT: In the first place, it has got a name on it. What do you call it?

A It is a basic product book.

THE COURT: It is self-explanatory.

Q Is it a training device or a sales device?

A It is a training device in the sense, confidential in the sense that it is more concentrated than anything that is in the larger book. A man cannot learn two or three hundred products in one week's time. So in order to avoid the confusion, we cut and take out of the big book ten or twelve products so that if he had nothing else more than that, he could go with these for a number of month and make a good living. What is included in there that is not in the big book is the information on how to demonstrate it,

where to demonstrate it, the types of accounts to call on, the packaging, the pricing of that packaging so that he has at least a little knowledge of the names and where they go when he goes out on observer training with the salesman that first week, so he can just understand a little bit about what is going on.

Q Is the basic product book a confidential document to the company?

A Yes, highly confidential.

MR. SHAPIRO: I object to the conclusion.

THE COURT: Now you are getting into the contents of the book. You are attempting to demonstrate that is confidential material. Now you've got to introduce it. You have got to mark it for identification. I thought you were only going to show the books to him. You are doing more than that -- you are going into the contents of the books now.

MR. WILLIAMS: Yes. Would you mark this for identification?

(Plaintiff's Exhibit 9 marked for identification.)

Q P-9 for identification is the Basic Product Book, correct?

A Correct.

Q Does that contain confidential information?

A Yes.

MR. SHAPIRO: Just a moment. Your Honor, I'm going to object because he is going to start describing --

THE COURT: I'm sure it isn't all basic confidential information. There might be a great mass of it that is not confidential.

MR. WILLIAMS: Yes, Your Honor.

THE COURT: To characterize it all as confidential, I don't think that should be submitted.

Q Does that book, Exhibit 9, contain confidential information?

MR. SHAPIRO: I'm going to object on two grounds.

THE COURT: Have him point out generally what is confidential about it.

MR. WILLIAMS: Yes, Your Honor.

Q In general terms, what confidential information does that book contain?

A It contains the company policy in regard to writing of orders, terms of shipment --

THE COURT: What is confidential about that? What is the nature of that, that would be confidential or top secret. I hear so much about top secret business in the government that I'm always suspicious of that term, "confidential information."

MR. WILLIAMS: Shall I inquire in that direction, Your Honor?

THE COURT: Yes.

MR. SHAPIRO: Your Honor, excuse me, but may we know if this is the book which he claims was given to Howard Goldstein?

THE COURT: You can do it on cross examination if it isn't made clear now.

MR. SHAPIRO: I object. It is irrelevant.

Q How did you describe it?

A Company policy in regard to writing of orders, terms and shipments.

Q Is that material different for your company than it is for other companies?

THE COURT: What do you mean?

Q You get an order and you write it down, and there is nothing confidential about that except the name, is there?

A Well, the terms of the orders might be confidential, sir.

THE COURT: What do you mean, "terms of the orders"?

A As to the payment of invoices.

THE COURT: What is confidential about that? You send them a bill, and they are supposed to pay it, I suppose, within ten days or thirty days?

MR. WILLIAMS: Shall I inquire further, Your Honor.

THE COURT: Yes.

Q Does the company keep that material confidential and instruct its employees not to reveal it to other persons who are not employees?

A Yes, sir.

THE COURT: That doesn't make it confidential because they say, "Don't tell anybody." It might not be information in the nature of confidential information at all.

You haven't demonstrated to me up to now that there is anything confidential in there. There may very well be, but he hasn't told about it.

Q Tell us more in general terms what the confidential materials

contained in there?

A There is a recommended procedure on how to work a town successfully.

MR. SHAPIRO: I'm sorry, but I can't hear you.

THE WITNESS: There is a recommended procedure of how to work a town successfully.

THE COURT: That is just tips to salesmen, isn't it?

A Well, if they have not been in our business before --

THE COURT: In any event, it may have been confidential before, but it isn't confidential now as far as this case is concerned. The jury is entitled to know what that is that you call confidential.

MR. WILLIAMS: They shall, under proper instructions from the Court. This is a matter of the business practices of this company.

THE COURT: It hasn't been demonstrated to me up to now that it has been.

Q Tell us in addition what other materials --

THE COURT: Just a moment. I don't know why you get into all these details. They

have these books. It was sales information that was furnished this defendant. Why do you go into all the detail about this? It is your examination that is making this so extended. There is nothing different about this at all. Every new salesman gets sales literature.

Q Does this also have to do with the products?

A Yes, it does.

THE COURT: There is no secret formulae in there, are there?

A There are systems and methods of demonstrating this product that another company wouldn't have.

THE COURT: Those are not formulas, are they?

A No, they are not.

Q There are no secret formulas in that book?

A No.

THE COURT: There are no formulas as to how those products are made?

A No, sir.

THE COURT: Are you going to introduce it into evidence? If you are, get to it.

MR. WILLIAMS: No, I am not, Your Honor, because of the nature of it. I'm not

going to introduce it into evidence.

THE COURT: Then I'm not going to let you demonstrate what is in it if you are not going to introduce it in evidence.

MR. WILLIAMS: Yes, Your Honor. Let's set that Exhibit aside, then.

Q Tell us what was the name of the salesman in Cape Cod?

A Bob Jacobs.

Q Did Mr. Jacobs then report to you on the progress that he had made with Mr. Goldstein?

A Yes, he did.

Q Tell me, was there an additional formal week of training for Mr. Goldstein?

A Just immediately afterward?

Q Yes, immediately afterwards.

A Immediately afterwards, the week after that, I went with him in his territory for four days.

Q At that time had he been assigned a formal territory?

A Yes, he had.

Q And what was that territory, do you recall?

THE COURT: It is recited in the contract, isn't it?

A Yes, it is.

THE COURT: We don't need that again.

MR. WILLIAMS: Yes, sir.

THE COURT: Don't duplicate that. We know what that is. We have had it two or three times already.

Q Did you go with him in the territory shown in the basic contract?

A Yes, I did.

Q What was the procedure you followed with him?

A The first thing was to teach Mr. Goldstein how to establish a rapport with his customers. This is one of the most difficult things to do in our business. It is highly competitive, and lots of people are calling and selling these particular types of chemicals. In order to establish rapport, you must show a sincere interest --

THE COURT: Never mind the philosophy about it. What we want to know exactly is what you did, not why you did it, but what you did.

A Okay. The Gears of Selling that we have is a basic confidential book -- I taught Mr. Goldstein how to establish rapport and warm up a customer, make a transition into a product, demonstrate that product with our methods and systems, make a transition into a closing of the order, and teach him how to overcome objections, because if you can do that, it is good as a buy and sale.

* * * * *

Q To help him?

A Yes, sir.

Q And to train him?

A Yes, sir.

Q And by the end of that year, had Mr. Goldstein become a competent salesman for the company?

A Yes, sir, he was well on his way.

Q About how many months did it take for Mr. Goldstein to become a thoroughly or normally competent employee, as far as National Chemsearch was concerned?

MR. SHAPIRO: I will object to that question in its form.

THE COURT: Objection is overruled.

A I think the only way I can answer that, sir, is that with three hundred products --

THE COURT: Will you answer it this way. Ask him how much money he was making. That is the test, isn't it?

MR. WILLIAMS: I don't think that is the sole test, Your Honor.

THE COURT: Well, I do.

Q Well, how much money was he earning, do you recall?

THE COURT: At the end of a year.

A I believe about $18,000 to $20,000, but I am not sure. I

don't have the figures in front of me.

THE COURT: The very first year?

A Yes, sir.

Q Approximately how many months does it take to train the ordinary employee, the ordinary salesman?

A In order to learn everything that is in that presentation book, it takes at least eighteen months.

Q And did you continue to follow up with Mr. Goldstein after that first year?

A Yes, sir, the procedure after the first year.

Q Tell us what the procedure was?

A Yes. It is normally four times a year, approximately every three months.

Q What happens every three months?

A Every three months the same procedure follows. Now I can't tell you that I spent four days each time with Mr. Goldstein. It might have been a split week with Mr. Mitzner that was mentioned, and Mr. Goldstein -- two days each -- that type of thing, or it might have been a three-day trip, something of that nature.

Q What was the purpose of those trips? What did you do and what did you do with Mr. Goldstein?

THE COURT: Why do you go into such interminable detail in these things? You could

* * * * *

A Yes, I did.

Q What did you give him?

A I gave him an additional piece of territory, an additional county, and gave him approximately thirty account sheets of National Chemsearch customers.

Q What is an "account sheet"?

A An account sheet contains the customer's name, the buyer's name, the address of the company, what the customer has purchased, the amount he has purchased, and the price of those particular packages.

Q Does it also tell the name of the contact on that particular customer?

A Sometimes it does, yes.

Q Does it give other personal data about that customer?

MR. SHAPIRO: I'm going to object.

THE COURT: I don't understand what this is now. This is two weeks before he quit. Are you attempting to demonstrate that they informally increased his territory and gave him --

MR. WILLIAMS: No. At this point, Your Honor, I'm demonstrating that he got thirty additional customers, the names of thirty additional customers and confidential data on

the sheets of those customer sheets, at that sales meeting.

THE COURT: All right.

THE WITNESS: That's correct.

Q Would you have given those sheets to him if you knew at that time he was organizing his own business to go into competition with the company?

MR. SHAPIRO: I object. That calls for an operation of his mind --

THE COURT: Of course it does. Objection is overruled.

A No, I would not have given those sheets to him.

Q Are the account sheets carried in a book by the salesman?

A Yes, they are.

Q When Mr. Goldstein came to work for the company, what did he receive, a book containing account sheets?

A Yes, he did.

Q Do you recall approximately how many account sheets were contained in that book?

A Approximately a hundred.

Q Now from time to time during the years when he worked for the company, were additional account sheets sent to him?

A Yes, they were.

THE COURT: I don't quite understand

what "account sheets" mean. That doesn't mean a copy of invoices, does it?

A No. It is what I mentioned just before. It is a customer information sheet showing the customer's name.

THE COURT: Is that what you called the route sheet before?

A Yes.

Q I'm holding a black book in my hand. Are the route sheets contained in the black book similar to this?

A Yes, sir.

Q Are route sheets confidential information to the company?

A Yes, they are.

Q Why are they confidential?

THE COURT: It is as plain as the nose on your face, because they've got the customer's name, isn't it?

MR. WILLIAMS: Yes, sir.

Q Is there a company policy, Mr. Kimmel, regarding the contact of salesmen with customers?

A No, it doesn't.

Q I will ask it in a different form. Is there any other contact with customers by the company except through its salesmen?

A No, sir. The Chemsearch salesmen are its sole contact

with its customers.

Q There is only one salesman to one customer, is that correct?

A That's correct, sir.

Q Is it comparatively easy for a salesman in your business in Chemsearch to leave the company and set up his own business?

MR. SHAPIRO: Objection.

THE COURT: I will sustain the objection.

MR. WILLIAMS: I will withdraw the question in that form, Your Honor.

Q You have had an opportunity to examine Mr. Goldstein's testimony, have you not?

A Yes, I have.

Q Have you examined it in connection with the products which he is now selling?

A Yes, I have.

Q Are you familiar with the product he was speaking of in that examination?

A Yes, I am.

Q Are you familiar with the products that are made and sold by National Chemsearch?

A Yes, I am.

Q And are the products now sold by Mr. Goldstein similar in

* * * * *

and maybe I can cut this short.

(Exhibit handed to the Court.)

MR. SHAPIRO: I just don't know if it is something prepared for litigation.

THE COURT: I think this document is self-explanatory. I will receive it in evidence.

(Plaintiff's Exhibit 7 marked in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. WILLIAMS:

Q Is that what you call a statistical sheet for Mr. Dougherty?

A Yes, a Salesman's Statistical Report.

Q Based on your experience, Mr. Kimmel, can you tell us whether it requires a substantial amount of capital investment for an individual to set himself up as a chemical specialty salesman?

MR. SHAPIRO: Objection.

THE COURT: Objection is overruled.

A I don't believe so.

THE COURT: What has he got to have? He has got to have an automobile, in the first place.

A He's got to have an automobile.

THE COURT: What else does he need

to have?

A He's got to have some sources of supply.

Q Are there ready access to sources of supply?

A Yes. There must be thousands of them.

Q Will the sources of supply finance a salesman, such as that?

MR. SHAPIRO: Objection.

THE COURT: Objection is overruled. I think he must have some familiarity with the field here. Objection is overruled.

A Yes. In some instances, the salesman would be doing exactly the same thing he is doing with us. He would be working for that particular company, selling their products and then doing the shipping and invoicing and him receiving -

THE COURT: In other words, the company would have an incentive to finance him?

A Right.

THE COURT: I think when you have said that, you have said it all.

Q Are there numerous single people selling specialty chemicals?

A Yes, sir.

Q Are they financed by various chemical manufacturing and supply concerns?

A Yes, they would be.

Q And did those companies pay for the shipment?

A Depending on whether it is prepaid and invoiced to the account or that particular salesman says, "Charge the freight to me."

Q Do these companies invoice in the name of the salesman?

A Sometimes they invoice in the name of the salesman, and sometimes they invoice in their own names.

Q Is the purpose of that to make it easy for a man to sell specialty chemicals manufactured by that company?

A Yes, sir.

MR. WILLIAMS: You may inquire.

CROSS EXAMINATION

BY MR. SHAPIRO:

Q Mr. Kimmel, would you just give us again quickly your present position with the company?

A A Vice President of National Chemsearch, a Division of USAchem, Inc.

Q What is the territory that you supervise now?

A My territory is the Eastern Division, which consists of fifteen states.

Q And, generally, how far south do you go?

A From Pennsylvania to South Carolina.

Q It includes New York?

A It includes New York, New Jersey, Connecticut, et cetera.

Q Approximately what is the total number of salesmen that

* * * * *

laden with restrictions on him, and with no benefit of a lawyer --

THE COURT: You mean he is entitled to have a lawyer there?

MR. SHAPIRO: No. I'm not contending that he is entitled to have a lawyer there. If he had, I can tell you what the answer would have been.

THE COURT: He probably wouldn't have gone to work, either.

CROSS EXAMINATION CONTINUED

BY MR. SHAPIRO:

Q Let me ask you this. At that meeting in 1963, did you at any time encourage him to consult a lawyer regarding this contract that was going to restrict him for eighteen months if he left the company or was fired?

A No.

Q Have you ever encouraged anyone to consult a lawyer in signing this kind of a form?

A If anyone has ever mentioned that they would like to show this to their attorney, they have been allowed to do so.

Q On December 27, 1963, when this form was amended as to the territory, did you negotiate that amendment, the change in the territory?

* * * * *

Mr. Goldstein was selling to at the time that he left?

A I don't know whether it is in the testimony or not, but as far as the route books --

MR. WILLIAMS: I'm going to object to this. I believe it is in evidence, the number of customers that Mr. Goldstein was selling at the time he left.

THE COURT: If it is in evidence, there is nothing I can do about it. What do you want me to do about it?

MR. WILLIAMS: I believe that that fact is already in evidence, Your Honor.

THE COURT: If it is, I can't change it.

MR. WILLIAMS: Yes, Your Honor.

THE COURT: What is the question?

Q Can you tell me how many customers Mr. Goldstein was selling to regularly when he left?

A I said I don't know the exact number.

Q Can you tell me approximately how many?

A Approximately it would be somewhere between two hundred and two hundred and fifty accounts, and it may have been more than that.

Q Can you tell me how many potential customers there are in

* * * * *

Q You don't have any restrictions on who you will sell to, if they are able to afford your products and want them, do you?

A True, but you have to establish goodwill all the way through, and Mr. Goldstein --

MR. SHAPIRO: If it please the Court, this answer is not responsive.

THE COURT: Objection overruled.

A (Continuing) We lost the goodwill by Mr. Goldstein calling on these customers and selling them after nine years of experience and rapport with these customers in this territory. What you are saying to me is, "When will National Chemsearch if he does not sell these things?" We have lost the profit on what he has already sold.

Q And if you stop him from selling the next eighteen months, National Chemsearch will endeavor to sell to those customers, will they not?

A They certainly will.

Q And will National Chemsearch profit thereby if they make sales to those customers?

A If they make sales to those customers, yes.

Q If he is prevented from working, as the company demands, for the next eighteen months, will Mr. Goldstein receive anything during that period from the company, during the

* * * * *

Kimmel in connection with this action, and it is his affidavit, dated February 26, 1973, and I will read from Paragraph Three. (Reading):

"Harold Kimmel, being duly sworn, deposes and says:

"3. The chemical specialties industry is a highly-competitive business in which basically identical maintenance and sanitary preparations are marketed through aggresive sales programs to industrial, commercial and institutional users."

Q Now you said when Mr. Goldstein was hired, you gave him training in Cape Cod?

A No, I did not. I didn't give him training. He was given training.

Q Who gave him that training?

A Bob Jacobs.

Q Did Mr. Jacobs have any formal training in being an instructo in sales at that time?

A No.

Q Were there any product secrets furnished to Mr. Goldstein regarding formulations of products or manufacturing processes at any time?

A No.

* * * * *

supervise, the fact that these delinquent accounts get charged back to the salesmen on their commissions if the customers don't pay?

A It isn't an important matter --

Q You explained that to Mr. Goldstein in the first meeting?

A Yes.

Q You explained that?

A Yes.

Q Can you tell me what part of this form refers to that important point?

A We are talking about the selling business here?

Q No. You said you went through this agreement. Can you tell me what part of this agreement refers to that important point?

A I don't believe it does refer to that important point. I'm not sure. I don't believe so, no.

Q In the territory in which the contract covers, Mr. Goldstein worked for USAchem. Can you tell approximately how many other companies compete presently with USAchem?

A When you asked me that question in the deposition, I answered "twenty-five," Mr. Shapiro, and what I was referring to there were those companies who cover almost as broad a spectrum as we do on numbers of products.

Q Let's count those companies and any other that compete with

* * * * *

THE COURT: What do you mean "any part in it"? Sure, he is part of the company. He doesn't draw the complaint. You know that as well as I do. The lawyer sits in his office and draws the complaint.

Q Does it, as far as you know, have anything to do with actual damages suffered by the company?

THE COURT: It isn't supposed to. It is punitive. It means just what it says, punishment, as an example. It is supposed to compensate for the alleged violations.

Q Can you tell me how long it took to train Mr. Dougherty to take over the territory that he now sells, that Mr. Goldstein used to sell?

A (No response.)

Q How long did it take to train him?

A His training still isn't complete.

Q Prior to Mr. Dougherty working for USAchem, did he have prior selling experience, do you know?

A I believe he did.

Q Do you know the extent of the training that has been given to him to date?

A Yes. It has been quite extensive.

Q Have you made any study at the request of your attorneys or

* * * * *

Excerpts from Trial Testimony.

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Mr. Goldstein, where do you reside?

A 111 Franklin Road, Rochester, New York.

Q Are you married?

A I've been married for fourteen years. I have two daughters, Maureen, ten, and Marcy, twelve.

Q Will you tell me generally what was your work experience before you joined USAchem?

A I was a salesman for National Sales Company for about three years on the road selling appliances to retail outlets and then I worked for National Clothing Company selling men's clothing, and I think prior to that I was a member of the United States Marine Corps.

Q How did you come to work for USAchem?

A A friend of mine, Herb Mitzner, was working for National Chemsearch at the time, and he told me there would be some possible openings, and I thought I would look into it.

Q Did there come a time when you went down to New York City for an interview?

A Yes, sir.

Q Was that the first contact you had with the company, or did you have any other interview previous to that?

A I think I was interviewed by a fellow named Shelly Goodman, who was the Personnel Manager in Syracuse prior to going to New York.

Q At that time, that was 1963?

A Yes, sir.

Q How old were you then?

A Twenty-seven years old.

Q Tell me what happened when you went to New York and had this interview and who you first talked to when you got there?

A I think the first gentleman I talked to when I went to New York was Leonard Rosenbaum.

Q Tell us where you saw him and what, if anything, was said between the two of you?

A I saw him in his office, and I think the conversation was on the light side. He asked me about my family, and I think he reviewed the employment application I had made out, and I think at that time I also gave a mock presentation. I had to sell him, and I think it was a trophy that he had in his office.

Q What, if anything, did he say after your presentation?

A I think he asked me if I thought I had done a good job selling him the trophy. I said, "Frankly, I don't think it was a very good job." And he proceeded to tell me,

"Yes, it wasn't a good job." And he said, "Howie, you are a nice guy, but I really don't think you are for this company."

Q Did you leave then?

A No. I wanted a job, and I knew what I had to say as a salesman, and I told him, I said, "Mr. Rosenbaum, I think you are going to make a big mistake if you don't hire me, because I'm going to do a heck of a job for your company, and I will be a credit to your organization."

And I remember very well, that he put out his hand, and he said, "Welcome to Chemsearch."

Q About how long did that entire conversation take, do you recall?

A Well, I think I saw Mr. Rosenbaum for maybe a half hour.

Q Did you then see Mr. Kimmel?

A I think he was the first gentleman I saw after I spoke to Mr. Rosenbaum. Apparently, he called him on intercom and told him that he had hired me or offered me a job.

Q Had you ever met Mr. Kimmel before this time?

A I really can't recall.

Q Did you go in to see Mr. Kimmel in his office?

A Yes. After meeting Mr. Rosenbaum, I went in to see Hal Kimmel.

Q The man who testified here yesterday?

A That's correct, sir.

Q What, if anything, was the conversation in Mr. Kimmel's office?

A Well, the first thing Hal congratulated me on getting a job and welcomed me to the organization and everything else that went along with it, and he said that he was proud to have me. It was light conversation.

Q About how long did that conversation last in his office?

A I think I was with Hal maybe ten, fifteen minutes. It was ten years ago. I would say probably fifteen minutes.

Q You were here yesterday when Mr. Kimmel testified at great length about an extensive review that he made of a contract paragraph by paragraph with you, of that form he testified from?

A Yes.

Q Did that in fact occur during that conversation?

A Absolutely not.

Q At that meeting that you testified to with Mr. Kimmel, about fifteen minutes, did you sign any papers?

A I am sure there were some forms that I had to fill out for tax exemption, a number of forms that I know they put in front of me, yes.

Q What, if anything, did he say, if you recall?

A (No response.)

* * * * *

He said, "This is the area, for the most part, that you are going to work in, and you develop it. You work hard, and it will be like developing a business of your own."

Q After this meeting, did you start some training with the company? Did you go to Cape Cod?

A I don't remember the exact time sequence. I think shortly after I was hired, I went to Cape Cod to train with a fellow called Bob Jacobs.

Q What did that training consist of at Cape Cod?

A I had an opportunity to work with a man who had been established in the territory and see how our industry operates, and I drove around with him for about three and a half days and saw how he handled customers, how he sold the products.

Q Did your training consist of anything more than riding around with him and observing him?

A Basically, that was it. I had the opportunity, of course, to ask him any questions that came to mind, and he tried his best to answer them.

Q After that, did there come some time when you were with Hal Kimmel in training in Rochester?

A After I returned from Cape Cod, I think it may have been the following Monday or a week later, and I don't recall exactly, but Hal did come up. It was Monday afternoon. I had to pick him up. In fact, I think I made a few calls

in the morning before I picked him up, and we worked the balance of that day, and he left Thursday afternoon, so it is a matter of three and a half days that he was with me the initial time.

Q What did you do, generally, in the time that he was with you?

A Hal was a good observer. Well, for the most part, that first week, he made quite a few of the sales, and I tried to learn from him, and he tried to tell me more in depth about the selling techniques related to Chemsearch.

Q Now yesterday he talked about "Gears of Selling." What does that term mean in the company?

A Well, Gears of Selling refers to a pamphlet that illustrates exactly what the gears refer to; the first gear being meeting the customer, introducing yourself, warming them up, giving them a novelty, doing whatever is necessary to create a relaxed atmosphere. The second gear is a transition, going into the product itself and telling the customer what the product is all about, and after you have accomplished that, at some point you try to make the sale. That is the third gear. And then there is a fourth gear, which is if you don't make the sale, then you go back to the second gear and you start selling the product all over again, telling about the product and trying to make the sale.

Q Did you get any other training at sales meetings over the years?

A Well, it was a case of bringing out some new products and telling about the application of the product and going over some mock sales again. I mean as far as a sales meeting, this is a time to have some fun and get together with some old friends. It was really to let off steam. Everybody had a ball.

Q When you started this job, did you get a customer list from Mr. Kimmel or from USAchem, from somebody in the company? Did you get a customer list?

A Hal mentioned that, and I tried to think back. I know that I received maybe the names of twenty people that have been sold, but that list, I think -- well, they didn't have a man in the territory for a year and a half, so those sales were made in '61. I went to one in '63, so I really didn't pay too much attention to that list.

Q Was that list, or anything else that you have ever received from the company in the nine years that you worked for them, ever marked "confidential" or anything like that, you know, for authorized eyes only? Was anything that you ever got from the company, was that marked in that way?

A Not that I recall. I can't think of anything.

Q Were you told anything that was confidential that you got

it. They had a company set-up that sold you the premiums. They gave you premiums from the time you were hired. They sent them to you. You had to pay for them. They gave them to you. They wanted you to use them.

Q Can you tell me what was your usual monthly cost for gifts and novelties of this type, approximately?

A I really tried to keep it at a minimum. I would say it is probably $100, $150, average.

Q How long were you out of work in 1970 when you had the gall bladder operation?

A I would say it was around three months.

Q Did you keep getting your draws during that period of time?

A Yes, sir.

Q Did you ever have any conversation at that time regarding the draws that you were getting with Mr. Kimmel?

A Well, I don't think I saw Mr. Kimmel personally. He called me on the phone to see how I was doing. Yes, I did ask him. I mean, at that point I had never had a debit balance. I never had been in the red. I always made more money than my draw, so I received commission checks, but at this point, I was in the hospital three months, and I was concerned. I said, "Hal, you know after not working for three months, I am going to have a debit balance, and I'm going to owe some money here."

I said, "My requirements aren't that great now, because I am not working. I am in the hospital. I am laid up."

He said, "Listen, what are you worrying about now? You are sick. Just get better. Leave the draws to me. I will take care of that. It is bookkeeping, basically."

Basically, that was it. He just wanted me not to be concerned about money.

Q Did he tell you that that would be taken against your commissions?

A He wanted me not to be concerned about it. Earlier, when I was employed, it was understood that this was just a bookkeeping thing.

Q So that when you earned commissions, then the draws would be paid off?

A Yes.

Q Did the subject ever come up of whether you had to pay this back if it did not get paid off against commissions? Was that ever discussed with you and Mr. Kimmel?

A Well, I think the answer to that question, honestly, and the inference was when I asked him --

THE COURT: Not "the inference."

What was said about it?

Q What, if anything, did he say? Let's take the time in '70

* * * * *

Q Did you call Mr. Kimmel?

A Yes, I did.

Q What, if anything, was said during that --

THE COURT: Let's fix the time.

Q Tell me, when you called Mr. Kimmel in regard to this conversation, when you quit, when was that?

A I can't tell you a specific date, but it was near the end of August, and I am pretty sure it was on a Friday.

Q What, if anything, was said between you when you called? What did you say and what did he say, either in words or substance?

A It was rather a brief conversation. I called him, and I said, "Hal, I'm going to call it a day."

I said, "I want to call it a day."

He said, in effect, "You mean you are quitting -- you are leaving?"

I said, "That's correct."

He said, "You mean you are going to stick me with $3,800," or some figures in the three thousand dollar area, and I don't remember specifically what it was, and at that point, I really saw red, because my belief was that I had done a good job for the company, and he knew --

Q What did he say?

MR. WILLIAMS: I object.

THE COURT: I sustain the objection.

Q Just tell us what he said.

THE COURT: What we want are facts in the conversation and not how you felt.

Q What, if anything, after that did he say?

A That was it. He didn't say any more about it. Well, he did say, "You are really not the nice guy that everybody thinks you are."

And I said, "Well, that is open to debate."

He said, "Well, we will straighten this out some way."

I said, "Well, I have never run from a fight yet."

Q Was that the end of the conversation?

A For the most part, yes.

Q At that time, did you have any uncashed draw checks?

A I had one of them in my possession, I think.

Q Did you receive a second one?

A Well, I think in that conversation with Hal --

Q The question is, did you receive a second draw check? You said you had one in your possession. Did you receive a second draw check?

A Yes, sir.

Q You had two checks, and how much was each check for?

A $250 a piece.

Q What, if anything, did you do with them?

* * * * *

or anything like that. We want to know what you talked about, what was said, as near as you can tell us.

A I told him I wouldn't consider working in management at all, because I had two girls and my wife had just had an operation for a tumor malignancy, and I wasn't about to leave my family.

Q Then you did not pursue that any further?

A It was just dropped.

MR. SHAPIRO: You may inquire.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Mr. Goldstein, where do you live? What town?

A The Town of Irondequoit, sir.

Q Where do you live in the Town of Irondequoit?

A 111 Franklin Road.

Q Where is Franklin Road, for those of us who are not familiar with it?

A Franklin Road is right near the juncture of Cooper Road and St. Paul Boulevard.

Q How far is it from the Webster boundary?

A Webster boundary?

Q Yes.

A Ten miles, five miles.

* * * * *

A Yes, sir.

Q Are there any industries in the Town of Webster or schools or businesses or governmental agencies that could have used your products, the chemical specialty products?

A Naturally.

Q How about Penfield? Could you have sold in Penfield without violating the contract?

A Mr. Williams, I didn't realize I was violating the contract.

THE COURT: He didn't have to sell in Greece if he didn't want to, although he was within his territory. He had a right to sell there, but he didn't have to sell there.

MR. WILLIAMS: It was not within his territory, Your Honor. Greece wasn't in his territory.

THE COURT: What is it you are trying to demonstrate, then?

MR. WILLIAMS: I am trying to demonstrate that this man, after he left the plaintiff could have sold chemical specialty products in a number of towns in Monroe County without violating his contract.

THE WITNESS: I was told by my attorney that I wasn't violating any contract, that

* * * * *

A Yes, sir.

THE COURT: And there isn't any question about it, that in that contract there was in writing where your territory was definitely set forth?

A I have seen it subsequently. The question was inferred that I knew of my territory because I read the contract. Mr. Kimmel told me about my territory.

THE COURT: Your testimony is now that you didn't bother to read the contract, is that right?

A That's correct, sir.

THE COURT: You didn't care what was in there?

A I just wanted a job. I wanted to work, sir.

THE COURT: And you signed anything that was in the contract?

A Yes.

THE COURT: What I am trying to find out is how you, an intelligent salesman, can try and tell us now that you signed anything that was put before you.

A Sir, I am like just any other person. You put a document in front of me, and for the most part, you sign it. I

wanted to get a job, and that is why I signed it.

THE COURT: I don't follow that at all. I don't think most persons do.

Go ahead.

Q Mr. Goldstein, examine Plaintiff's Exhibit 1 and see if the typewritten term doesn't state the original territory that you had?

A Yes, sir.

MR. WILLIAMS: May I read it to the jury, or may I have the witness read it?

THE COURT: What is it?

MR. WILLIAMS: The towns and counties within his territory originally.

THE COURT: It is in the contract, isn't it?

MR. WILLIAMS: Yes.

THE COURT: Of course, you can read it. Anything in evidence can be read in whole or in part by anybody in the case.

MR. WILLIAMS: Thank you.

(Reading): "The following Counties in the State of New York: Steuben, Yates and Ontario plus the following municipalities in Monroe County, New York: Honeoye Falls, Rush,

Mendon, Henrietta, Pittsford, Ridgeland and Rochester."

Isn't that correct?

A Yes.

Q Was that your original territory?

A Yes.

Q The Town of Webster, the town next to the town you live in, was not in that territory, was it?

A No, sir.

Q And the Town of Penfield was not in that territory, was it?

A Naturally, no, it is not.

Q Nor was Irondequoit, where you actually live nor Greece. correct?

THE COURT: You don't have to ask him that. You just demonstrated it from the paper.

MR. WILLIAMS: Yes, Your Honor. Thank you.

Q Mr. Goldstein, here is Plaintiff's Exhibit 8 in evidence, and do you recognize that?

A This is my employment application, sir.

Q When did you fill that out, Mr. Goldstein?

A Well, I would imagine --

THE COURT: Has it got a date on it?

A I don't see one here, sir.

MR. WILLIAMS: It is on the fourth page.

THE COURT: Point it out to him so it won't take so long.

MR. WILLIAMS: It is on the fourth page (indicating).

THE WITNESS: February 24, 1963.

Q Is that one of the papers that you referred to that you signed?

A Where?

Q Is that one of the papers you referred to in an earlier answer that you signed before you were employed by Chem-search?

THE COURT: He was asked what papers he signed at the time he went in April. Your question isn't clear now when you are referring to. Was that one of the papers he signed in April?

Q How many papers did you sign in April of 1963?

THE COURT: That asks you for a number.

A It would be impossible for me to give you an honest answer.

Q Ten?

A I really couldn't say. I really don't know.

Q Was it twenty?

A I don't think it was that many.

Q Was it ten?

A That is probably a closer approximation.

Q Do you know what any of the papers were that you signed?

A Well, I would have to say --

THE COURT: If you don't remember, you don't have to apologize for it at all. It was a long time ago. Don't think you have to apologize if you don't remember.

A I'm trying to be as helpful as I can.

THE COURT: Don't try to be helpful. All we want is the answer to the question. You don't need to try to help anybody.

A I am sorry, then. I have to say that I don't know. I don't remember.

Q Mr. Goldstein, tell me the name of one of your customers that you were selling at the time you worked for National Chemsearch, that you were still selling?

A Keuka College.

MR. WILLIAMS: Will you mark this for identification?

(Plaintiff's Exhibit 10 marked for identification.)

Q I show you P-10 marked for identification, Mr. Goldstein. What is it?

A It is called a "Sales Record."

Q It is a Sales Record for what customer?

A Keuka College.

Q Whose Sales Record is it?

A You mean who made these sales on this?

Q Whose Sales Record is that? Who does it belong to?

A It belongs to National Chemsearch, I would imagine.

Q Turn the Exhibit sideways where the holes are for the rings and read it.

A It says, "Confidential Information."

MR. WILLIAMS: I offer that into evidence, Your Honor.

THE COURT: It is received.

(Plaintiff's Exhibit 10 marked in evidence.)

Q At the beginning of your training period, you worked with Hal Kimmel?

A Yes, sir.

Q Did you and Hal Kimmel over the years develop a close relationship and a real rapport?

A I had respect for Hal, yes.

Q Would you describe your relationship as one of friendship?

A To answer that question honestly, I would recognize Hal Kimmel as a Sales Manager. I was a good man for him, and he did what was expedient to keep me happy.

Q As the years went by, Hal Kimmel helped you in your sales, did he not?

A I would like to have you be a little more specific with your question.

Q Did Mr. Kimmel come up and assist you in your difficulties in your territory?

A I heard Mr. Kimmel's testimony and he said that he --

THE COURT: Never mind what he said. What do you say?

A All right. I said earlier that Mr. Kimmel worked with me for about three and a half days when I began my employment and why I am sure about this is because in the information that I gave my attorney, a couple of papers turned up, an analysis of the work I had done the few days that I was with Mr. Kimmel. One was in April when he worked with me for the first time, and the next time that I saw Mr. Kimmel was in January of '64. I had never seen that man more than twice in that nine-month period.

Q Has Mr. Kimmel been up to visit with you at your home?

A Yes.

Q Has he stayed overnight in your home?

A No, but I have invited him to my home.

Q During the course of the years you were employed by Chemsearch, did you call Mr. Kimmel from time to time and ask him questions about products?

A When I was first employed, we were required to call the Home Office. I think it was a matter of maybe three months we called at least once a week. If we had any problems, it was discussed, and that was the contact I had with Mr. Kimmel, other than the first time he went out to work with me in my territory, and then I saw him again in January of '64.

Q Did you call him from time to time and talk with him?

A Yes, sir.

Q And in 1970, when you were ill, who was the first person in the company that you contacted?

A My friend, Herb Mitzner.

Q Who was the next man?

A I don't know. Eventually, I talked with Mr. Kimmel, yes.

Q Did you talk to him about your illness and about supporting yourself while you were ill?

A In 1970?

Q Right.

A I indicated earlier we discussed the question about draws and the first time I'm going into a debit balance concerned

me.

Q Let me stop you there, if I may.

A Yes, sir.

Q At the beginning of your sales period, when you first went with the company, you were in a debit balance, weren't you?

A You mean from "Day One," is that what you're referring to?

Q Right.

A Until you go out and generate business, of course, you have a debit balance.

Q That was the second time you were in a debit position, right? When you were sick was the second time you were in a debit position?

THE COURT: When you were first there, you weren't entitled to any commissions at all until you earned them, but you did start to get draws in the beginning. Everybody understands that.

MR. WILLIAMS: Yes, Your Honor.

THE COURT: I think you are going to confuse it by these questions.

Q And you paid that first draw back, didn't you?

A The first draw? Which one are you referring to?

Q The first debit period. When you first went with the company, your commission exceeded the debit, and you finally

got into a credit position, right?

THE COURT: I think your question about the beginning confuses the matter entirely.

THE WITNESS: That is what I want to clarify, Your Honor. Until you go out and work and generate sales, you have nothing to --

THE COURT: What is the question?

Q Did you earn commissions to pay that debit back, the first debit?

A The first time I was in the debit balance that I recall was in 1970 when I was sick.

Q That is the first time?

A That I recall, yes, sir.

Q You weren't in a debit balance in 1963 at all?

THE COURT: You see, that is what is confusing. Now you are introducing confusion here now by your questions. It wasn't there before. Nobody is questioning it at all. He started to get draws. He started to earn commissions. He got level. He wasn't in debit again until 1970.

MR. WILLIAMS: Your Honor, I submit that this witness is denying that at this point.

THE COURT: He isn't denying it at all.

THE WITNESS: If I went to work the end of April and I got one draw check for $250, and I didn't generate any sales, of course, I owed $250 at that point.

Q When Mr. Kimmel worked with you the second week of your training, did Mr. Kimmel place orders? I think you have testified he did.

A Mr. Kimmel went out with me and showed me how to do business, yes, sir.

Q Did he place orders?

A I don't understand what you have reference to, "place orders."

Q Did Mr. Kimmel sell products of the company to customers?

A It was kind of a joint effort. We worked together to generate business.

Q Did you get credit for those sales in that first week that Mr. Kimmel worked with you?

A When we worked together, yes.

Q Going to 1970, in your conversation with Mr. Kimmel, you told Mr. Kimmel that you were going to be ill and that you were going to go into a debit position, correct?

A Yes, sir. He was aware of that, I'm sure.

Q Did you ask Mr. Kimmel to excuse any debit that you might have with the company?

A Never.

Q Did Mr. Kimmel excuse a debit that you had with the company?

A Well, yes. I didn't feel I owed it. You have to be more specific, really.

Q Here is Exhibit D-8, Mr. Goldstein. Do you recall receiving that letter?

A I read the letter, yes, sir.

Q And that letter is one saying, "Today I have a very good feeling. Not only is it a beautiful April afternoon," and so forth, is that correct?

A Yes, sir.

THE COURT: That isn't the important part of it. What is the important part of the letter?

MR. WILLIAMS: The important part is: (Reading): "It was nine years ago that you joined the company, and it makes all of us very proud to realize that we have spent nine wonderful years together."

Do you recall that language in that letter?

THE COURT: Whether he recalls it or not, it is in the letter, and he said he

read the letter.

Q On April 3rd, 1972, the date of that letter, were you thinking of leaving the company?

A I would say no.

Q That wasn't in your mind at all at that time?

A To be honest, at times I thought of changing employment so I would be dishonest in saying it was never in my mind. I don't know specifically at that time.

THE COURT: That is what he is asking for. What was in your mind, not what you did or what you said, but what was in your mind?

A At that time I would say no.

Q When did it first come into your mind to leave the company?

A You mean headstrong feelings about leaving?

THE COURT: No. I think what that means is when did you finally conclude to leave the company?

A Well, that was after an August meeting of '73, sir.

THE COURT: You mean '72?

A '72, yes. I'm sorry -- '72.

Q It had not occurred to you at all before that time to sever your relationship with the company?

THE COURT: You didn't ask him whether it occurred to him. You asked him when he con-

cluded it.

MR. WILLIAMS: I asked him when he started to think about it.

THE COURT: You are asking him now.

Q When did you first start to think about it, Mr. Goldstein?

A I would say I gave it serious thought after I got out of the intensive care unit, the cardiac care unit in Rochester General.

Q Did you have a heart attack?

A I was admitted in Emergency. They thought I was having a heart attack, and I had all the symptoms, and they put me in cardiac care.

Q Did you have a heart attack?

THE COURT: Just a moment. He is trying to be fair with you. You are asking him to diagnose what his condition was.

MR. WILLIAMS: I think the witness is probably aware whether he did or not.

THE COURT: He probably is, but he probably didn't make his own diagnosis either.

MR. WILLIAMS: Yes, Your Honor.

Can you answer the question?

THE COURT: What question?

MR. WILLIAMS: Whether he had a

heart attack or not.

THE COURT: Were you informed by someone that you had a heart attack?

A I had symptoms of a heart attack. Dr. Gerald Ryan, a heart specialist, told me that I had symptoms, and then I took a treadmill test. I think he told me, "These things have a lot of ramifications. We can't isolate it, but consider yourself lucky. Consider it a warning. Just use your head. If you ever get any pain like that again, come in and see me."

THE COURT: I think all this comes out by necessity, because you asked him did he have a heart attack. He isn't a doctor, and I understood from the examination before trial that there is some dispute about what the nature of the attack was. But you want him to make a diagnosis of it.

MR. WILLIAMS: No, Your Honor, I don't.

THE COURT: Your question intimates that.

THE WITNESS: I told you what the doctor told me.

Q Mr. Goldstein, when you first concluded that you were going

to go out on your own or leave the company, did you decide what you were going to do?

A No. I didn't have anything specific in mind. In fact, I was hoping to get out of the chemical business.

Q This is in the month of June, 1972?

A Well, I don't remember the time exactly. I think I was admitted to the hospital in the middle of June, and then for a couple of weeks I don't remember too much when I got out of the hospital. The doctor gave me five weeks' disability. He told me I shouldn't go back to work and to just relax.

Q During that period of time, you made contacts with companies which sell chemical specialties, correct, or manufacture chemical specialties, correct?

A In the month of July, I gave some thought as to what I wanted to do, and thinking that I probably wouldn't go back to Chemsearch, and to answer your question, I checked into possibilities of other suppliers in the chemical field, and actually, other employment, too.

Q Quite a few suppliers, correct?

A Quite a few different job opportunities.

THE COURT: We will take a short recess.

(Recess from 11:30 o'clock A.M. to 11:50 o'clock A.M.)

Excerpts from Trial Testimony.

CROSS EXAMINATION CONTINUED

BY MR. WILLIAMS:

Q Mr. Goldstein, you were organizing Gold Seal Associates at the time you were employed by National Chemsearch, correct?

A I was looking at other means of employment.

Q Were you or were you not organizing Gold Seal Associates --

THE COURT: Now "organizing," I don't know what you mean by that, because all he did was file a certificate to do business under the assumed name of Gold Seal Associates.

Q When did you file that certificate, Mr. Goldstein?

A I think it came about that I called down to the County Office Building, and I asked them what had to be done.

THE COURT: You found out you had to file a certificate to do business under an assumed name?

A I asked them what was required, that what if I don't want to go into business, and they said, "You register your name and even if you don't go into business --"

Q May I interrupt? Just tell us when you filed the certificate?

THE COURT: It is already in evidence.

A Around the first of August.

Q 1972?

A Yes, sir.

Q When did you call the suppliers?

A I think I said when I was on disability, I wrote some letters. The doctor said I shouldn't work, but he didn't say nothing about writing letters.

Q Mr. Goldstein, please tell us the dates, if you would. Was it July and August of 1972?

A At that time I wrote some letters and checked into some sources of supply.

Q In the month of June, 1972, did you receive draw checks?

A Yes, sir.

Q How many did you receive?

A I would imagine for the whole month I received four checks, one a week.

Q How much were the checks?

A $250.

Q In the month of July, did you receive the same number of checks in the same amounts?

A Yes, sir.

Q In the month of August, did you receive the same checks in the same amounts?

A Yes, sir.

Q In the month of June what was your total sales for the

company, for National Chemsearch?

A I don't know exactly. I imagine they were minimal, because I was in the hospital at the time.

Q In the month of July, how much were your sales for National Chemsearch?

A I was on disability. I didn't have to work, so I imagine they were minimal then.

Q Would it be helpful to you if I hand you Exhibit 3, your commission statements, on that question?

A All right.

(Plaintiff's Exhibit 3 handed to the witness.)

Q Examine Plaintiff's Exhibit 3, Mr. Goldstein, and tell us what your total sales for National Chemsearch were in June of 1972?

A Where are the total amounts?

THE COURT: If I were you, I would read from the Exhibit and ask him if those were his sales for that month. You've got it in writing before you.

MR. WILLIAMS: Thank you, Your Honor.

Q The statement for June 30, 1972, shows gross commissions of $238.80, is that correct?

A If it is on the statement, I would say it is true.

Q And that was on "Estimate of Pending Orders" of $2,941.10?

A I don't have the figures. I would imagine what you are saying is true, if it is on the statement. I would imagine it is true.

Q Examine the June, 1972, statement, and tell us what your sales were for June?

A I'm trying to find the dollar amount for the sales here. Do you know where it is exactly?

Q It is the bottom figure, Mr. Goldstein, $2,868.60, is that correct?

A Where are you pointing to, Mr. Williams?

Q The bottom figure on the sheet.

A You asked me what my sales were for the month?

Q That's right.

A This says, "Estimate of Pending Orders." This is not my actual sales for the month of June, though.

Q What were your sales, do you recall?

A That is the figure I tried to pick up here. I couldn't find it.

Q But at any rate, your commissions were $238.80, is that correct?

A Gross commissions, $238.80, yes, sir.

Q And your draw was $1,000?

A Yes, sir.

Q In the month of July, 1972, your commissions were $99.74, is that correct?

A Yes, sir.

Q Your draw, again, was $1,000?

A Yes, sir.

Q And that in the month of August, 1972, your gross commissions were $14.28, correct?

A Yes, sir.

Q And that was after you were well, correct?

A Yes, sir. That was after I was off the disability, the month of August. I was still under the weather.

Q And your draw was again a thousand dollars?

A Yes, sir.

Q During any of those three months, did you at any time mention to any member of the company, to Mr. Kimmel, or anyone else, that you were organizing your own business, that you were calling suppliers and that you filed a certificate to do business?

A During what period?

Q During June, July and August, 1972.

A In August, that was the time I terminated, so I didn't even tell Mr. Kimmel at that time because of the conversation we had, and he didn't ask me if I was better or going into business, or what I was doing. We just terminated. He

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day that you called Mr. Kimmel, didn't you?

A Sir, if the day I called Mr. Kimmel was the 29th, that was the day I made my first sale. I don't have a calendar, and you are telling me something.

THE COURT: If you know, will you tell us, and if you don't know, will you tell us you don't know.

A If I had a calendar, I would know exactly when I called.

THE COURT: You haven't got a calendar.

A All right. So I don't know, to answer your question honestly. What you inferring is that the day I called Mr. Kimmel was the day I wrote my first order, and that is not true.

Q When did you write your first order? How many days after you called Mr. Kimmel?

A I don't know exactly, but I would say it had to be at least a week, somewhere in there.

Q A week after?

A Somewhere in that time.

MR. WILLIAMS: Would you mark these for identification?

(Plaintiff's Exhibits 11, 12, 13 and 14 marked for identification.)

Q Here is Plaintiff's Exhibit 11 for identification, Mr. Goldstein, and that is a copy of a letter, and did you receive that letter?

A I think I saw something of that nature, yes, sir.

Q What is the date of the letter?

A August 28th, 1972, sir.

MR. WILLIAMS: I offer it into evidence.

THE COURT: It is received.

(Plaintiff's Exhibit 11 marked in evidence.)

(Mr. Williams read to the jury from Plaintiff's Exhibit 11 in evidence.)

Q Does that refresh your recollection of the date you talked to Mr. Kimmel?

A That indicates to me that I didn't call him on the 29th. That letter states that I terminated the 25th.

Q The 25th was a Friday?

A I don't know, sir. I think it was.

Q So the next business day was the 28th, correct?

A Monday.

Q Right?

A Yes.

Q I show you Plaintiff's Exhibit 12 marked for identification

and ask you if you can recognize that?

A It looks like my wife's writing.

Q What is the document?

A I think when I had an examination, sir, I was asked to bring in all the copies of the orders that I had written -- do you want me to answer the question?

Q No. Let me interrupt you, please. Are those the first six sales you made for Gold Seal Associates?

A I don't know without looking, to answer your question. I can explain more fully what this represents. At the time we compiled the sales that I made, you wanted all the sales that I made from the day I started in my business until the time of my examination. I compiled those, and I found that some of them were missing, and I think we hand-wrote --

THE COURT: I would like to end this interminable conversation. What do you want to find out? Do you want to know when his first sale was? He fixed a definite date on that, on August 29th or the next day. He has definitely fixed that. Now what is it you want to know after that?

MR. WILLIAMS: I don't recall that the witness was that definite, Your Honor.

MR. WILLIAMS. Was August 29th your first sale?

A According to this, yes, sir.

Q Who was that sale to?

A The Town of Weyland, Highway Department.

Q Was that a National Chemsearch customer when you worked for National Chemsearch?

A I sold this account while I worked with Chemsearch, yes, sir.

Q Did you sell other accounts on that day?

A There are two other entries here. There is the Steuben County Jail.

Q Did you sell that account while you were with National Chemsearch?

A Yes, sir.

Q What is the next one?

A Town of Erwin, Highway Department.

Q Did you sell that account when you were with National Chemsearch?

A Yes, sir.

MR. WILLIAMS: I offer Exhibit P-12 into evidence.

MR. SHAPIRO: No objection.

THE COURT: It is received.

* * * * *

A Yes, sir.

Q So for two months you retained those in your own possession, correct?

A That's correct.

Q And did you retain these customer sheets, the route sheets?

A I never had them, sir.

Q Did you have a route book filled with route sheets?

A I had a book similar to that. It was a print-out that was supplied to me by the company maybe a year or so ago.

Q And that contained the names of customers?

A Yes, sir.

Q And you retained those, correct?

A You asked me if I gave those back to the company.

Q Did you keep those for that period of time, for that month and a half?

A Yes, sir.

Q Did you keep the product books?

A I kept everything that I had -- well, whatever I had, I had.

Q Before you came with National Chemsearch, what was the most amount of money that you would earn?

A Probably close to ten thousand, sir.

Q Here is your application, P-8 in evidence, and turn to Page 3 in that application and examine the material at the

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action for an injunction be dismissed --

THE COURT: I will decide that in a different phase of the case. After I get a verdict from the jury here, then I will determine the question of the injunction. I'm not going to take that up now.

MR. SHAPIRO: If it please the Court, Your Honor has said that you will submit to the jury the question of whether the plaintiff has sustained damages as a result of loss of profit, and if so, how much --

THE COURT: Here is exactly the questions I am going to submit to the jury (indicating), and there is one copy for each of you there. The jury will have that in writing, and they will answer it in writing.

MR. SHAPIRO: May I move, then, that in accordance with the brief that we have just submitted to Your Honor that mitigation of damages is to be considered by them to the extent that their own salesmen were in the field using the same territory; otherwise, Your Honor, they are going to recover twice, if that is the case.

THE COURT: I deny that. I specifi-

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EXCERPTS FROM TESTIMONY OF JAMES J. DOUGHERTY given on 10-3-63.

MR. SHAPIRO: Off the record.

(Discussion ensued off the record.)

(Commission Statements (11) marked Defendant's Exhibit 1, for identification.)

Q. Just take these, and I am going to ask you a couple of general questions about them. Mr. Dougherty, you have furnished us with Exhibit 1, for identification, which purports to be a series of copies of monthly statements describing the sales made by you in behalf of USAchem, starting with October, from October, 1972, through the end of August, through August 31, 1973. Now do these statements accurately and fairly reflect all of the sales that you have made for your employer during that period of time?

A. Yes.

Q. Do they show everything that you have sold?

A. Yes.

Q. From the time that you started to work with the Company, October 16, 1972, what have been the gross sales to date made by you, according to those statements?

A. Fifty-five thousand one hundred seventy-five dollars.

Q. There has been an additional month since then, which would be September of 1973, that is not shown there, is that

correct?

A. I haven't received that statement yet.

Q. Can you tell me approximately what were your gross sales for the month of September, 1973?

A. Between $4,800.00 and $4,900.00.

Q. During the time that you have been with the Company has there been a change in the pricing structure of the products that you have sold? In other words, has there been either a general price increase or percentage increase, or any change in the way that prices are determined, as far as you know?

A. Yes.

Q. When would that have occurred, and what was it?

A. I believe it was May 1, 1973.

Q. What was the change in the pricing structure?

A. Six per cent across the board.

Q. So that all the products that you sold went up by six per cent on May 1, 1973?

A. Right.

Q. Has that been the only change in the pricing structure?

A. Yes.

Q. Has there been any change in the commission structure that you receive on the sale of those products, since your

* * * * *

products constitute, out of your total sales, if you are able to?

A. I couldn't come up with a figure or that.

Q. Has anyone from the Company ever spoken to you regarding your approaches to customers that were sold by Mr. Goldstein when he worked with the Company, anyone in your Company speak to you about that?

A. In what way?

Q. I am asking you if anyone has ever spoken to you about approaching customers that were sold by Mr. Goldstein?

A. Yes.

Q. Who was that?

A. My Manager, Dick Rothenstein.

Q. What, if anything, did he say regarding your approaches to those customers?

A. Try and get the customers back.

Q. Did he suggest any methods?

A. Just keep calling on them.

Q. How many of your customers, as of today, are customers that were furnished to you at the time your employment commenced, that is in terms of percentage? Can you tell me approximately how many customers were customers at the time you began your work?

A. Probably about 60 per cent, 65 per cent.

Q. Then would it be fair to say that about 35 per cent to 40 per cent would be new customers?

A. Yes, or customers that I haven't sold.

Q. Well, let's break this down. Approximately what per cent of your present customers are customers that you personally have developed in the last year, either in number or percentage of total customers?

A. When I first started I was averaging between 18 and 20 new accounts a month, and as time as gone on that has reduced to where it is about eight to ten a month.

Q. Have you been encouraged to solicit new customers?

A. Yes.

Q. What form has that encouragement taken; is there any difference in your remuneration based on new customers?

A. Well, it takes a lot more time with a person, to see the right party on the first call, and to close that party on the first call than it would if they were a customer; takes a lot more work.

Q. My question is, what encouragement have you received from your Company to solicit new customers? Do they provide any additional incentive to sell a new customer, as compared with selling an existing customer?

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